Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 340.

EDWIN F. HALE,
Appellant,

AGAINST

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from a final order of the United States Circuit Court for the Southern District of New York, entered June 10, 1905, dismissing a writ of *habeas corpus* sued out by the appellant and remanding him to the custody of the respondent (Rec., 38, 35), under a commitment issued, as alleged in the petition for the writ of *habeas corpus* (Rec., 2), and as conceded by the return (Rec., 23), under the following circumstances:

On May 2, 1905, the appellant, a director and the secretary and treasurer of the MacAndrews & Forbes Company, a New Jersey corporation, pre-

sented himself before the Grand Jury for the Southern District of New York, in obedience to what purported to be a writ of *subpœna duces tecum* issued out of the Circuit Court for that District April 28, 1905, under the seal of the Court, signed by the Clerk, and bearing *teste* of the Chief Justice of the United States, commanding him to lay aside all business and excuses, and appear and attend before that body

> " to testify and give evidence in a certain action now pending and undetermined in the Circuit Court of the United States for the Southern District of New York, between the United States of America and the American Tobacco Company and MacAndrews & Forbes Company, on the part of the United States " (Rec., 13–4),

and further commanding him to bring with him and produce (Rec., 14–5).

> "(1.) All understandings, agreements, arrangements or contracts, whether evidenced by correspondence, memoranda, formal agreements and other writings, between MacAndrews & Forbes Company, and either of the following persons, firms or companies, from the date of the organization of the said MacAndrews & Forbes Company, J. S. Young Company, J. D. Lewis, American Licorice Company, National Licorice Company, Meller & Rittenhouse, Stamford Manufacturing Company.
>
> "(2.) All correspondence, by letter or telegram (including copies of all letters or telegrams sent by said MacAndrews & Forbes Company, or any of its officers, employees, agents or other representatives) between MacAndrews & Forbes Company and the following persons, firms or companies, from the date of the organization of the said MacAndrews & Forbes Company: J. S. Young Company, J. D. Lewis, American Licorice Company, National Licorice Company, Meller & Rittenhouse, Stamford Manufacturing Company.

"(3.) All reports made, or accounts rendered, to MacAndrews & Forbes Company, by the following persons, firms or companies, from the date of the organization of the said MacAndrews & Forbes Company: J. S. Young Company, J. D. Lewis, American Licorice Company, National Licorice Company, Meller & Rittenhouse, Stamford Manufacturing Company.

"(4) Any agreement or agreements, contract or contracts, arrangement or arrangements (whether evidenced by correspondence, telegrams, memoranda or formal written instrument) between MacAndrews & Forbes Company and the Amsterdam Supply Company, or the American Tobacco Company, or the Continental Tobacco Company or Consolidated Tobacco Company, from the date of the organization of the said McAndrews & Forbes Company.

"(5.) Any and all letters received by the MacAndrews & Forbes Company, since the date of its organization, from any of the following named persons, firms or companies: Strater Brothers, Louisville, Kentucky; Monarch Tobacco Works, Louisville, Kentucky; H. N. Martin Tobacco Company, Louisville; Day and Night Tobacco Company, Cincinnati, Ohio; E. O. Eshelby & Company, Cincinnati, Ohio; Frischmuth Brothers & Company, Philadelphia, Pa.; Daniel Scotten Tobacco Company, Detroit, Michigan; R. A. Patterson & Company, Richmond, Virginia, Larus & Brother Company, Richmond, Virginia; United States Tobacco Company, Richmond, Virginia; P. Lorillard Company, Jersey City, New Jersey; R. J. Reynolds & Company, Winston, North Carolina; P. H. Mayo Company, Richmond, Virginia; and, also, copies of all letters and telegrams sent by the MacAndrews & Forbes Company, since the date of its organization, to either of the said persons, firms or companies; and all contracts agreements or arrangements between the said McAndrews & Forbes Company and any of the said persons, firms or companies, whether such agreements, contracts or arrangements are evidenced by correspondence, telegrams, memoranda or

written instruments, now in your custody, and all other deeds, evidences and writings which you have in your custody or power concerning the premises."

The subpœna gave the appellant notice that for a failure to attend, he would be "deemed guilty of a "contempt of Court, and liable to pay all loss and "damages sustained thereby to the party aggrieved, "and forfeit TWO HUNDRED AND FIFTY DOLLARS in "addition thereto" (Rec., 15).

Before being sworn the appellant asked to be advised of the nature and purpose of the investigation in which he had been summoned before the Grand Jury, whether it was under any statute of the United States, and the specific charge, if any had been made, in order that he might learn whether or not the Grand Jury had any lawful right or authority to make the inquiry, and whether there was anything lawfully pending before that body upon which witnesses might be summoned, sworn and examined; and he also asked that he be furnished with a copy of the complaint, information or proposed bill of indictment, if any, upon which the Grand Jury was acting, in order that he might know concerning what transactions, matters or things he was called upon to testify or produce evidence. He said his subpœna required him to attend and testify and give evidence in "a certain action now pending and undetermined "in the Circuit Court of the United States for the "Southern District of New York between the "United States of America and the American To-"bacco Company and MacAndrews & Forbes Com-"pany, on the part of the United States," and to produce various papers and documents; that he was informed that there was no action then pending in the Circuit Court between the Government and the corporations named, and that the vague and general description of the papers and documents led him to suppose that the Grand Jury was investigating no

specific charge against any one; and that if that was the fact, his counsel advised him that he ought not to obey the summons or submit to examination (Rec., 20).

Without answering the appellant's inquiry, one of the three Assistant United States Attorneys who were in attendance before the Grand Jury proceeded to interrogate him as to his name, residence and business. Having given his name and residence, and stated (Rec., 10) that he was the secretary and treasurer of the MacAndrews & Forbes Company, he was asked:

> (1.) "That company is engaged in what business" (Rec., 10)?

To which he responded:

> "I shall have to respectfully decline to answer further questions on the grounds, first, that there is no legal warrant or authority for my examination as a witness, and, second, that any answers may tend to criminate me" (Rec., 11).

He was thereupon asked the following questions (Rec., 11-2):

> (2.) "What business were you in before you came to New York City?"
>
> (3.) "Who is the President of the MacAndrews & Forbes Company?"
>
> (4.) "What is the business of the MacAndrews & Forbes Company?"
>
> (5.) "Where is their office?"
>
> (6.) "And where is the office of the American Tobacco Company?"
>
> (7.) "Who is the President of the American Tobacco Company?"
>
> (8.) "Is there any agreement, or understanding, or arrangement, between the American Tobacco Company and MacAndrews & Forbes Company in relation to the trade or business in licorice, licorice paste or licorice mass, affecting the business between several States of the United States?"

(9.) "Do you know a company by the name of J. S. Young Co.?"

(10.) "Your company sells licorice paste to companies manufacturing plug tobacco throughout the States of the United States, does it not?"

(11.) "Are you in the employment of the American Tobacco Company?"

He refused to answer all of these questions for the reasons above given, and stated that he declined to give further testimony for the same reasons, which, at the request of the Assistant United States Attorney, he repeated at length (Rec., 11).

Being asked whether he had produced the papers called for by the *subpœna duces tecum* he said that he had not,

> "first, because it would have been a physical impossibility for me to have gotten them together within the time allowed, and, second, because I am advised by counsel that upon the facts as they now appear I am under no legal obligation to produce them, and, third, because they may tend to criminate me" (Rec., 11).

After some discussion as to the form and contents of the subpœna, and after the appellant had again said that he had not produced the papers "for the reasons previously stated," the Assistant United States Attorney addressed the appellant as follows (Rec., 13):

> "Mr. Hale, I desire to advise you that this is a proceeding under the so-called Sherman Act, being an act to protect trade and commerce against unlawful restraints and monopolies, 26 Statutes, 209, 1 Supplement Revised Statutes, 762, and following, and the acts amendatory thereof and supplementary thereto, and particularly Chapter 755 of the Laws of 1903, approved February 25, 1903; and I also advise you that under the last named act no person shall be prosecuted or be subjected to any penalty or forfeiture for or

on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit or prosecution under the said act, that is, referring to the Sherman Act, under which this prosecution is brought; provided, however, that no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying. And I also advise you that it is the purpose not to proceed to prosecute you, or subject you to any penalty or forfeiture on account of anything that you are now asked to testify to, or produce evidence, documentary or otherwise, regarding it, in this proceeding, and I offer you and assure to you immunity and exemption for any such testimony that you may give. Do you still decline to answer the questions which have been put to you?"

The appellant responded:

"I must respectfully decline to answer.

"Q. You decline to answer all the questions that have been put to you on the grounds which you have stated, in relation to each of the questions? A. I do" (Rec., 13).

At this point the hearing was adjourned to May 5th, when the Grand Jury filed in open court a presentment or report charging the appellant with contempt of court in having failed and refused to produce before the Grand Jury the "various books, "letters, memoranda and other writings, all of "which are specifically enumerated and set forth in "the said subpœna," and also in having failed and refused to answer the eleven questions above set forth (Rec., 8-9).

This presentment or report informed the Court that the appellant had been commanded by the subpœna to testify and to produce the "various books," &c., "in a certain matter then under investigation "before the said Grand Jury," that "the "said books," &c., "are material to an in-

"vestigation being conducted before the said "Grand Jury," that the questions which the appellant had refused to answer were "pertinent to "the said investigation" ("and proceeding") (Rec., 10) "and material thereto," and that the Assistant United States Attorney who had propounded them was "in attendance before the said Grand "Jury, and was conducting the said investigation "in behalf of the said Grand Jury" (Rec., 8).

It further informed the Court of the manner in which the Assistant United States Attorney had, in addressing the appellant in the Grand Jury room, characterized "the proceeding then pending before" that body, and how he had offered and assured the appellant immunity and exemption for any testimony he might give (Rec., 9).

On the facts thus set forth the Grand Jury asked that such proceedings be had as were, "in the "premises, in accordance with law" (Rec., 10).

The appellant being present in court when the presentment or report was submitted the Court, on motion of the Assistant United States Attorney, directed him

> "to answer the questions as propounded by the Grand Jury, and forthwith produce the papers" (Rec., 18).

The Grand Jury thereupon repaired to the Grand Jury room (Rec., 19) and the appellant was again called before them. The questions were again put to him and he repeated his refusal to answer them, giving his reasons as before. In like manner and upon the grounds previously stated by him he refused to produce the books and papers called for by the subpœna *duces tecum* (Rec., 19–21). He was again told that the "proceeding" was under the "so-called Sherman Act," &c., and assured of immunity, notwithstanding which he persisted in his refusal, explaining that he did so with the utmost respect for the Grand Jury and the judgment of the Court (Rec., 22).

A second report or presentment setting forth what occurred on this occasion was submitted to the Court by the Grand Jury on May 8th (Rec., 15-17), at which time, the appellant being again present, the order was made adjudging him guilty of contempt, fining him five dollars, and directing his commitment to the custody of the Marshal until he complied with the order of the Court "by answering said questions "and producing said papers and documents, or is "otherwise discharged by due process of law" (Exhibit "B," Rec., 7).

The purpose of the writ of *habeas corpus* was to determine the legality of the appellant's restraint under the commitment issued May 11, 1905, pursuant to this order, by virtue of which the appellant was taken into custody by the Marshal (Exhibit "A," Rec., 5), and this appeal is from the final order dismissing the writ of *habeas corpus* and remanding the appellant to the custody of the Marshal.

Specification of Error.

The appellant contends that the Circuit Court erred (1) in dismissing the writ; (2) in holding that he was lawfully held in custody under the commitment (1st and 2d Assignments of Error, p. 40). He maintains that his imprisonment, restraint and detention were and are without lawful authority, and that the Circuit Court erred in dismissing the writ of *habeas corpus* for the reasons set forth in the petition (pp. 1-4, *a* to *m*). Of the other errors specifically assigned (pp. 40-42) the appellant will upon this appeal rely particularly upon those which, for convenience, may be summarized as follows:

(*a*.) The presentments or reports of the Grand Jury failed to set forth any facts upon which the Circuit Court could lawfully entertain any charge or charges of contempt against the petitioner, or act

or proceed in any manner in the premises (3d Assignment of Error, p. 40).

(*b.*) When the petitioner attended before the Grand Jury there was no "cause" or "action" of any kind whatever pending in the Court in which he could be lawfully required to testify or give evidence (4th *Id.*).

(*c.*) The Grand Jury was not in the exercise of its proper and legitimate authority in prosecuting the so-called "investigation," "proceeding" or "matter" thus described in the reports or presentments, the powers of a Federal Grand Jury being limited under the Constitution to the investigation of specific charges against particular persons, and it being apparent that there was under investigation by the Grand Jury at the time the petitioner attended before that body no specific charge against any particular person (5th *Id.*).

(*d.*) Section 1 of the Act of February 25, 1903, does not give the petitioner immunity from prosecution, for or on account of the transactions, matters or things concerning which he was directed to testify and produce evidence before the Grand Jury, the investigation herein before that body not being a "proceeding, suit or prosecution" under either of the Acts referred to in the Act of February 25, 1903; consequently the petitioner was within the legitimate exercise of his right under the 5th Amendment of the Constitution, when he refused to testify or produce evidence before the Grand Jury on the ground that by so doing he might have criminated himself (6th, 7th and 8th *Id.*).

(*e.*) The Act of February 25, 1903, is unconstitutional and void in that it undertakes to deprive the various States of the United States of their sovereign right and power

to prosecute and punish persons concerned in transactions, matters and things which violate their own laws, thus infringing upon the provision of Article X. of the Amendments to the Constitution of the United States that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people (10th, 11th, 12th and 13th *Id.*).

(*f.*) The order of May 5th, directing the petitioner to forthwith produce the papers called for by the subpœna *duces tecum* was made in violation of the Fourth Amendment. It was, in effect, a warrant to search for and seize the papers mentioned in the subpœna *duces tecum*. It was not issued upon probable cause, or supported by oath or affirmation, and failed to particularly describe the place to be be searched or the things to be seized (15th, 16th and 17th *Id.*, p. 42).

(*g.*) The papers mentioned in the subpœna *duces tecum* being the property of the McAndrews & Forbes Company and in the petitioner's custody solely by reason of his official relations toward that company, the compulsion of said subpœna, and of the order that he produce such papers would, if effective, have amounted to an unreasonable search for and seizure of the papers and effects of the corporation, which it was the petitioner's duty as such officer and custodian to protect by lawful means, as he is now doing (18th and 19th *Id.*).

(*h.*) The production of the said papers being required of the petitioner in his capacity of officer and director of the said corporation, and the order so requiring not being issued upon probable cause, or supported by oath or affirmation, and failing to "particularly describe the place to be searched, or the things to be seized," its issuance constituted a

violation of the said Fourth Amendment (20th and 21st *Id.*).

ARGUMENT.

FIRST POINT.

The presentments or reports of the Grand Jury set forth no facts authorizing the Circuit Court to entertain any charge against the appellant, or to act or proceed in any manner in the premises.

Unless the Grand Jury in prosecuting the investigation referred to in its two reports to the court was acting within the scope of its jurisdiction, the court was without authority to punish the witness for his supposed contumacy; refusing to answer questions, and all of its acts and proceedings in the premises were without authority and void.

If this proposition needs any support from authority the following cases are cited:

People v. *Cassels*, 5 Hill, 164, where a witness committed for refusing to answer questions relating to a criminal complaint before a justice of the peace was discharged on *habeas corpus* on the ground that the justice in inquiring into such criminal complaint was acting outside of his jurisdiction, the court saying, by Bronson, *J.:*

> "Here neither the crime nor the offender was in Chenango, and the Justice was without the shadow of authority in attempting to inquire into the matter. The whole proceeding was *coram non judice.*"

Ex parte Fisk, 113 U. S., 713, where a witness committed for contempt in refusing to submit to an

examination before trial ordered by the United States Circuit Court for the Southern District of New York was released on *habeas corpus* on the ground that the Court was without jurisdiction to make such an order. The Court said, per Miller, *J.*:

> "When, however, a court of the United States undertakes by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void."

Cooley on Constitutional Limitations (7th Ed.), page 575, (*note*):

> "Any action taken by a court in the absence of the *facts* upon which its jurisdiction rightfully rests is void, and may be collaterally impeached,"

citing

Scott v. *McNeal*, 154 U. S., 34.

That the witness can refuse to answer questions or produce papers if the body subpœnaing him has no jurisdiction in the premises was assumed in Counselman's case, 142 U. S., 547, and in Brimson's case, 154 U. S., 447, and was expressly decided in Kilbourn v. Thompson, 103 U. S., 168, and with reference to a Grand Jury investigation, in Lester's case (*post*) and Hartranft's appeal (*post*).

It is doubtless true that the Grand Jury will ordinarily be presumed to have followed the "usual" methods of procedure. But such presumption only arises "in the absence of any averment or suggestions to the contrary."

United States v. *Terry*, 39 Fed. Rep., 355.

Here, so far from showing that the District Attorney had informed the Grand Jury of "the nature

of *the charge*," &c. "It is manifest from the facts recited in the presentment * * * that the investigation * * * was not based upon any specific charge," but was "directed to the discovery" of some undisclosed infraction of law, &c. (Rec., 27).

Since no presumptions are to be indulged in in favor of the jurisdiction of the grand jury or of the Court when they are against the liberty of the citizen, it follows that the appellant should have been discharged unless it appeared from the record before the Circuit Court that the grand jury was prosecuting an inquiry within the scope of its jurisdiction. No such fact appears.

The first presentment or report of the grand jury made May 5th refers to what was going on before the grand jury only as "a certain matter then under investigation before the grand jury," "an investition being conducted before the grand jury" (Rec. 8), "the proceeding before the Grand Jury" (Rec., 9), and "the said investigation and proceeding" (Rec., 10); and shows that the appellant was "duly advised" by the Assistant United States Attorney that "the proceeding then pending before the said Grand Jury was a proceeding under the so called Sherman Act" (Rec., 9). The minutes returned with the report also show that the Assistant United States Attorney, in advising the witness, referred to the "proceeding" before the Grand Jury as "this prosecution" (Rec., 13).

The subpœna annexed to this report had called upon the appellant to testify before the Grand Jury, &c., "in a certain action now pending undetermined * * * between the United States of America and the two corporations before named" (Rec., 13-14), and the minutes, a copy of which accompany the report, were entitled, "Before the United States Grand Jury. The United States *vs.* American Tobacco Company and McAndrews & Forbes Company" (Rec., 10).

The presentment or report of May 8th contains no additional information on the subject (Rec., 15-19).

What, then, was the matter, subject or thing which the Grand Jury was *investigating*? What was the "proceeding" the Assistant United States Attorney was conducting "in behalf of the said Grand Jury?" What was there before the Court from which it could *see and determine* that it was a matter, subject or thing legitimately within the cognizance of the Grand Jury, or to which its functions extended?

The powers and duties of a Federal Grand Jury are concededly limited to inquiries into crimes and offenses against the federal laws committed within the territorial jurisdiction of the court in which it is empaneled. We shall maintain, in a subsequent point, that its authority to summon and examine witnesses begins only after a definite charge against some particular person or persons has been made. But waiving that point for the present, and assuming the existence of the broadest "inquisitorial" power in the Grand Jury, we submit there is absolutely nothing in the record indicating or even remotely suggesting that the Grand Jury was engaged in investigating even a suspected violation of law.

To what, then, were the questions which the petitioner refused to answer pertinent? And to what were the "various" books, letters, memoranda and other writings material? What was there, in short, before the Circuit Court from which it could see and determine that what was demanded of the petitioner by way of oral testimony or documentary proof was relevant to anything in respect to which the Grand Jury had authority to inquire?

The truth is the court made no finding in this connection. Both of the Grand Jury reports asserted the relevancy of the evidence sought for,

but the order of the court (pp. 7, 18) and the commitment (pp. 5-6) are destitute of any reference to this fact, upon the existence of which the soundness of the decision below wholly depended.

SECOND POINT.

There was no judicial matter pending in the Circuit Court at the time the appellant was required to attend before the Grand Jury, or when the orders of May 5th and May 8th were made, in or upon which he could lawfully be required to testify or produce evidence before the Grand Jury.

Notwithstanding the language of the *subpœna*, which commanded the petitioner to testify and produce papers and documents "in a certain action," the requirement that the petitioner appear before the Grand Jury necessarily shows that there was in fact no *action* pending, for there can be no action, or prosecution, nor even a criminal proceeding, until after some one has been formally accused of acts constituting a criminal offense, by indictment duly returned by the Grand Jury, or at least by information lodged before a magistrate.

Post v. *United States*, 161 U. S., 583, 587.

If, as is conclusively established by the record, there was no particular *charge* against the two corporations named in the subpœna *duces tecum*, or either of them, under investigation by the Grand Jury when the petitioner was called upon to testify, and the Grand Jury were merely engaged in an effort to find out *whether* they, or either of them, had or had *not* transgressed the "so-called Sherman Act," it is clear the Grand Jury were not in the exercise of any *judicial* function.

The courts of the United States can exercise none but judicial power. This power extends to the "cases" and "controversies" mentioned in Article III. of the Constitution. It extends no further. Unless there be a "case" or a "controversy," within the meaning of the Constitution, the courts are without jurisdiction or authority to act.

An *ex parte* inquisitorial investigation, based upon mere suspicion or speculation, without any complaint or charge, and that may and presumably would be without result, is not a "case" or "controversy" within the meaning of the Constitution; and no court has any power or right to lend its aid or assistance to such a matter.

Pacific Railway Commission v. *Stanford*, 32 Fed. Rep., 241.
Kilbourn v. *Thompson*, 103 U. S., 168.
Interstate Commerce Commission v. *Brimson*, 154 U. S., 447.

THIRD POINT.

The Grand Jury was not in the exercise of its proper and legitimate authority in prosecuting the alleged investigation upon which the petitioner was required to attend before that body; consequently its requirement that he should testify and produce documentary evidence, and the orders of the court, based upon his refusal so to do, were coram non judice and void.

The general considerations already advanced indicate the fundamental principle upon which the present point rests, namely, that the function of a

Grand Jury is certain and definite, and is clearly limited to the examination by the Grand Jury of specific crimes *duly alleged* to have been committed by particular individuals within the jurisdiction of the court of which it forms a part, and properly laid before it, in order that it may decide, upon the evidence submitted to it, whether or not the accused is or is not *prima facie* guilty of the acts so charged.

(*a.*) By the common law the powers of Grand Juries were restricted to the presentment to the court of accusations of two sorts, viz.: indictments returned after the examination of witnesses, and presentments made upon the knowledge or observation of the grand jurors themselves.

The former was a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by the Grand Jury.

To this end, says Blackstone, "the sheriff of every county is bound to return to every session of the peace, and every commission of Oyer and Terminer, and of general gaol-delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things, which on the part of our lord, the king, shall then and there be commanded. * * * This Grand Jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. *They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor;* * * * When the Grand Jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill, 'ignoramus;' or, we know nothing of it; intimating that though the facts might possibly be true, that truth did not appear to them; but now, they assert in English more absolutely, 'not a true bill;' or (which is the better way) 'not found;' and then the party is discharged with-

out further answer. * * * If they are satisfied of the truth of the accusation, they then indorse upon it, 'a true bill;' anciently '*billa vera*,' the indictment is then said to be found, and the party stands indicted."

Bl. Com., Book IV., Ch. 23.

A grand jury presentment, as distinguished from an indictment, was "the notice, taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king; as the presentment of a nuisance, a libel and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it."

Ibid. See also *Chitty*, Vol. I., p. 162.

The form of the grand juror's oath was as follows:

> "*Oath of the Foreman:* Sir, you as foreman of this grand inquest, for our sovereign lady the queen and the body of this county, shall diligently inquire, and true presentment make, of all such matters and things as *shall be given to you in charge*, or shall otherwise come to your knowledge, touching this present service; the queen's counsel, your fellows, and your own, you shall keep secret; you shall present no one through envy, hatred, or malice, neither shall you leave any one unpresented through fear, favor, affection, gain, reward, or hope thereof, but you shall present all things truly and indifferently as they shall come to your knowledge, according to the best of your understanding. So help you God."

The other jurymen were thus sworn:

> "The same oath that your foreman hath taken on his part, you shall well and truly

keep, and observe on your respective parts. So help you God."

2 Gude, Crown Pract., 583.*

The Grand Jury being thus sworn, the bill was preferred before them.

"Previous to this the prosecutor must cause it to be properly prepared and engrossed on parchment."

Chitty, Vol I., p. 316.

Each witness was sworn that "the evidence he shall give to the grand inquest *upon the bill of indictment against* the *defendant*, shall be the truth, etc."

Ibid, 322.

"At common law," says ARCHBOLD, "it was necessary *after the indictment was engrossed* that the crier or some officer of the court (R. v. Tew, Dears., 429; 24 L. J. [M. C.], 62) should administer the oath to the witnesses in open court, and *then* the indictment was laid by the proper officer before the Grand Jury."

Cr. Pl., etc., (22d Ed.) 89-90.

As indicating the necessity of submitting a duly engrossed bill to the Grand Jury before that

*And see Rex *v.* Shaftsbury, 8 Howell St. Tr., 759; 3 Harg St. Tr., 417, where it is given in the following form:

"You shall diligently inquire and true presentments make of all such matters, articles and things as shall be given you in charge, as of all other matters and things as shall come to your own knowledge touching this present service; the King's counsel, your fellows and your own you shall keep secret; you shall present no person for hatred or malice, neither shall you leave any one unpresented for fear, favor or affection, for lucre or gain or any hopes thereof; but in all things you shall present the truth, the whole truth and nothing but the truth to the best of your knowledge. So help you God."

In the Book of Oaths, p. 206 (quoted in a note to How. St. Trials, 772), the oath as formerly used is given: "You shall truly enquire and true presentment make of all such things as you are charged with—all on the queene's behalf, the queene's councell your owne and your fellowes' you shall well and truly keepe; and in all other things the truth present: so help you God and by the contents of this booke."

body could properly enter upon an inquiry into the crime therein charged it is interesting to refer to the common law forms of indictments for offenses in connection with Grand Jury proceedings, all of which, without exception, recite the presentation of the bill of indictment, the contents of the bill, etc.

> "See *Davis*, Prec. Ind., &c. (form for persuading a witness "not to give evidence against a person charged with an offense before the Grand Jury), p. 219; *Reg* v. *Hughes*, 1 C. & K., 519 (perjury before a Grand Jury*); *Wharton's Prec.* (1st Ed.), 328.

That at common law grand juries had no power to inquire *whether* crimes had been committed or to indulge in any of the inquisitorial ventures which are in these times so popular with public prosecutors must be assumed in the absence of any recorded case even suggesting that power.

(*b.*) The Grand Jury was continued as a part of our federal institutions by the Fifth Amendment to the Constitution, which went into force December 15, 1791, viz.:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of *a Grand Jury*, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger."

The powers and duties of the grand juries thus ingrafted into our system are nowhere defined, either by the Constitution or by any federal statute. It is clear, therefore, that they are only such as were possessed by grand juries at the common law, namely, of considering and

* "That heretofore * * * a certain bill of indictment against T. H. * * * was then and there, in due form of law, exhibited to (naming the grand jurors) * * * sworn and charged to inquire," &c., "which said bill of indictment was then and there as followeth, that is to say (setting out the indictment *verbatim* * * *)," &c.

acting upon indictments previously framed and laid before them by a known prosecutor, and of presenting facts within their own knowledge.

A recognition of the soundness of this proposition is found in the utterance of Judge IREDELL (U. S. Circuit Court, Virginia, November, 1795) in *U. S.* v. *Mundell*, 8 Va. (6 Call), 245, 247, who said:

> "And it is incident to the nature and constitution of the Grand Jury to indict when they receive information of a crime. The latter was said to be a presentment merely, and not an indictment; but that is not strictly correct, for the difference between them is this: If the Grand Jury present of their own knowledge, it is a presentment only; but if on the knowledge of others, it is an indictment."

(*c.*) It will not be pretended that there is any Federal statute authorizing a grand jury to inquire into matters called to their attention by the Court or prosecuting attorney, where there is no specific charge against one or more individuals. Nor could any such statute be enacted without infringing the spirit of the Constitution, which confines the powers of the Federal courts to the consideration of judicial matters exclusively.

(*d.*) The present day notion that a Grand Jury has practically unlimited inquisitorial power rests, without doubt, upon various loose and ill-considered utterances in reported cases, in consequence of which we find in our text-books such expressions as the following:

> "Although it has been sometimes asserted that at common law a Grand Jury was charged especially with inquisitorial duties, and was empowered to institute inquiries and investigations into criminal offences (per Avery, *J.*, in *State v Witcox*, 104 N. Car., 847. See also to the effect that a Grand Jury has inquisitorial powers, Ward *v.* State, 2 Mo., 120, 22 Am.

Dec., 449, and a dictum by Church, *C. J.*, in State *v.* Wolcott, 21 Conn., 271), according to the weight of authority the power of the Grand Jury to originate criminal prosecutions otherwise than by a presentment based upon the personal knowledge or observation of the members of that body, is ordinarily limited to cases in which individuals have been charged with specific crimes before a magistrate, in which cases the accused has a responsible prosecutor upon the record who may, if he swear falsely, be indicted for perjury, or *to cases which are called to its attention by the Court or the prosecuting attorney*, and it has no power of its own motion to institute a prosecution by summoning and examining witnesses for the purpose of obtaining information upon which to base a presentment of a supposed offender."

17 Am. and Eng. Enc. L. (2d Ed.), 1279, citing numerous cases.

(*e.*) An examination of the cases will show not only that no Court in this country has ever *decided* that there can be a legitimate Grand Jury inquiry without a previous *charge* of crime, but that, except in the single State of Tennessee, where there is legislative authority for it in respect to certain classes of offenses, the theory of general inquisitorial power in a grand jury is absolutely repudiated.

Thus, in *In re Lester*, 77 Georgia, 143 (Oct. Term, 1886), the Supreme Court of Georgia, after indulging in general observations which might, standing alone, justify the modern idea, immediately proceeds to limit these observations as follows:

"Anything they can find out by their own inquiry and observation is legitimate and praiseworthy, but they have no authority to force private persons or the officers of other courts to disclose to them who may have violated the public laws, and the names of persons by whom such infractions can be established; in short, to make every man a spy upon the conduct of his neighbors and associates, and compel him to violate the confi-

> dence implied in holding social intercourse with his fellows by forcing him to become a public informer. Such an exercise of power would be in derogation of general principles essential to the enjoyment of rights regarded as sacred and paramount in the intercourse between man and man; and these rights have been carefully guarded, not only by the spirit of our law, but by its express enactments. *The grand jury can find no bill nor make any presentment, except upon the testimony of witnesses sworn in a particular case, where the party is charged with a specific offense,* to speak the truth, the whole truth, and nothing but the truth, &c."

In *Lewis* v. *Commissioners*, 74 N. C., 194 Jan. Term, 1876), BYNUM, *J.*, after observing that " there is no authority of law to summon and send (witnesses) before the Grand Jury, upon mere matters of inquiry, a power which, if allowed, is capable of the grossest and most oppressive abuse, coupled with great temptations to abuse it," continued:

> " A prosecuting officer has no right, of his own motion, or upon that of an officious, if not an intermeddling and malicious prosecutor, to send witnesses to the Grand Jury room, merely to be interrogated *whether there has been any violation of the criminal law, within their knowledge.* The law denounces such inquisitorial powers, which may be carried to the extent of penetrating every household, and exposing the domestic privacy of every family. The repose of society, as well as the nature of our free institutions, forbid such a dangerous mode of inquisition. * * * As a general proposition, it is not advisable for a prosecuting officer to send a bill to the Grand Jury without endorsing upon it the name of a prosecutor, except upon presentments, or when the parties have been bound over by committing magistrates, or where the solicitor is directed by statute to send bills for particular offenses."

In Missouri it was held in an old case that when the Grand Jury have *probable cause* to believe that

some offense has been committed they may send for and examine persons who may, in their opinion, be most likely to possess evidence relating to these matters. But plainly recognizing that there must be an allegation of a definite crime and an accused person before the Grand Jury could act, the Court said:

> "Now, if it should ever happen that a Grand Jury should determine to have summoned every person in the county, with a view to make the experiment if perchance they *might find out* some offense, I have no doubt that it would be the duty of the Court to withhold its process and stop such a course. This would be an abuse of power."
>
> *Ward* v. *State*, 2 Mo., 120.

In respect to the cases that may be cited by the learned counsel for the respondents, including the *obiter* of Judge Thomas in the Kimball case (117 Fed. Rep., 156), and the work of Thompson and Merriam on Juries, where it is said, "the expressions which are quoted * * * bristle with evidence of the inquisitorial power of the Grand Jury," &c., it is enough to say that in no case that can be found in the books, where the point has been presented, directly or indirectly, has there been an intimation that a Grand Jury could prosecute an investigation in the absence of a specific charge of crime directed against a particular person or persons, except in certain Pennsylvania decisions where the courts have held that under the instructions of the Court attention of grand juries may be drawn to matters of general public import, such as "great riots that shake the social fabric, public pestilences," &c.

Case of Lloyd & Carpenter, Pa. L. J., 47.
Matter of Citizen's Ass'n., 8 Phil., 478.
Appeal of Hartranft, 85 Pa. St., 433.
Com. v. *Green*, 126 Pa. St., 531.

(*f.*) The fact that there is no constitutional, statutory or judicial authority for the institution of a "general" Grand Jury investigation is in itself sufficient to show its illegality, for as was said by Lord Camden in the celebrated case of Entick *v.* Carrington, 19 How. St. Tr., 1030, 1066, where the practice of issuing general warrants, in vogue for more than a hundred years, was declared illegal, notwithstanding its antiquity:

> "If it is law it will be found in our books. If it is not to be found there, it is not law."

(*g.*) In Tennessee the Legislature has by special enactments given express inquisitorial power to grand juries with respect to certain crimes.

In *Harrison* v. *State*, 4 Coldwell (44 Tenn.), 195 it was held that such statutes are in derogation of the common law, and can not be extended beyond their express terms.

In *State* v. *Adams*, 2 Lea, 647 an indictment was quashed because the Grand Jury sent for witnesses on suspicion to investigate as to whether a certain crime had been committed, with reference to which crime the statute did not confer inquisitorial power on the Grand Jury.

In *State* v. *Lee*, 3 Pickle, 114, it was said:

> "The inquisitorial power of the Grand Jury was unknown to the common law, and it exists in this State with respect to any given offense only when expressly conferred by statute."
>
> See also, *Glenn* v. *State*, 1 Swan, 19.

(*h.*) Even in Maryland, where it has been held that "however restricted the functions of Grand Juries may be *elsewhere*," in that State they have "plenary inquisitorial powers, and may lawfully themselves

and upon their own motion originate *charges* against offenders, though no preliminary proceedings have been had before a magistrate, and though neither the Court nor the State's attorney has laid the matter before them," it has never been suggested that Grand Juries may indulge in a fishing expedition (which is certainly not a *charge*) in order to find out if there is really any *basis for a charge.*

Blaney v. *State*, 74 Maryland, 153, 156.

(*i.*) The growth during recent years of the notion that Grand Juries may exercise "inquisitorial" powers has without doubt been occasioned by the gradual abandonment of the strict common law rule which required the framing and formal preferring of bills of indictment to the Grand Jury before the calling of witnesses in support of them, and the adoption of the easier and more convenient practice of preparing the bill after the jury had heard the evidence and voted to indict. The result has been that prosecutors have sometimes forgotten that in every case the indictment is supposed to be before the Grand Jury, and that, in theory of law, it has been actually prepared and presented to them as the basis of their inquiry.

Frisbie v. *United States*, 157 U. S., 160.
People ex rel. Hackley v. *Kelly*, 24 N. Y., 74.
People ex rel. Pickard v. *Sheriff*, 11 N. Y. Civ. Proc., 172, 185.
O'Hair v. *People*, 32 Ill. App., 277.
Webster's Case, 5 Greenleaf, 432.

In all of these cases the courts, so far from suggesting that a Grand Jury may prosecute an inquiry in the absence of a specific charge against one or more individuals, clearly indicate that they are limited to the examinations of a particular accusation which, when proven, can be reduced to the form of an indictment.

In the *Frisbie* case this Court said (per BREWER, *J.*):

> "But in this country the common practice is for the Grand Jury to investigate any *alleged* crime, no matter how, or by whom suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the *formal charge or indictment.* Thus they return into court only those *accusations* which they have approved, and the fact that they thus return them into court is evidence of such approval, and the formal indictment loses its essential character."

In the *Hackley* case the New York Court of Appeals said (per DENIO, *J.*):

> "The criticism of the appellant's counsel is that the examination of a witness before a grand jury is not a proceeding upon an indictment, and so not within the statute. In one sense it is not. But by the theory of proceedings in criminal cases *the indictment is supposed to be prepared and taken before the Grand Jury* by the counsel prosecuting for the State, and the *evidence is then given in respect to the offense charged in it.*"

In the *Pickard* case it was said:

> "The theory of the law is that a bill of indictment is prepared by the public prosecutor and presented to the Grand Jury *to pass upon it*, after hearing the evidence *in support of the bill.* The jury either find the indictment 'a true bill,' or ignore it and find it 'not a true bill' (4 Blackstone Com., 305). The practice, however, is for the District Attorney to inform the jury *of the charge to be investigated*, and, if a bill is found, to prepare an indictment such as the jury conclude to present."

In *Webster's case* the Supreme Court of Maine, after alluding to the English practice of preferring

indictments before the examination of witnesses, said (per MELLEN, *C. J.*):

> "In Massachusetts and this State the customary practice is, *after a complaint is made to the Grand Jury*, for them to hear the evidence in support of it; and, if they agree to find a bill, an indictment is thereupon drawn by the Attorney-General or County Attorney in legal form against the party accused, describing the offense of which they accuse him * * * It is believed, and seems to have been admitted, that such has been the uniform practice from time immemorial. In England, we presume, an indictment must be found and certified in the manner before mentioned, or it would not be sanctioned as legal; because such is their settled practice, and such their common law on the subject."

(*j.*) A plain intimation that a Grand Jury investigation should be based upon a specific charge in the form of a bill duly preferred to the Grand Jury is contained in Mr. Justice Gray's opinion in *Post* v. *United States*, 161 U. S., 585, 587:

> "Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused, either by indictment presented or information filed in court, or, at least, by complaint before a magistrate (*Virginia* v. *Paul*, 148 U. S., 107, 119 121; *Rex* v. *Phillips*, Russ. & Ry., 369; *Regina* v. *Parke, Leigh & Cave*, 459; s. c., 9 Cox Crim. Cas., 475. *The submission of a bill of indictment by the attorney for the Government to the Grand Jury, and the examination of witnesses before them*, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the Grand Jury in determining whether such proceedings shall be commenced; the Grand Jury may ignore the bill, and decline to find any indictment; and it cannot be known whether any proceedings will be instituted against the accused until an indictment against him is presented in open court."

See also *Beavers* v. *Henkel*, 194 U. S., 73, 84, where Mr. Justice Brewer said:

> "The Grand Jury is a body known to the common law, to which is committed the duty of inquiring whether there be probable cause to believe *the defendant* guilty of *the offense charged.*"

(*k.*) But even though a grand jury may send for witnesses before an indictment has been actually framed and laid before them, still it is perfectly certain that there must *at least* be pending before them some *specific charge* directed against a particular *person or persons.*

The soundness of this proposition was assumed by this Court in the case of *Counselman* v. *Hitchcock*, 142 U. S., 547, where BLATCHFORD, *J.*, said (p. 561):

> "It is contended by the appellant that the Grand Jury of the District Court was not in the exercise of its proper and legitimate authority in prosecuting the investigations specifically set out in its two reports to the District Court; that those reports could not be made the foundation of any judicial action by the Court; that the Interstate Commerce Commission was specially invested by the statute with the authority to investigate violations of the Act and charged with that duty; and that no duty in that respect was imposed upon the Grand Jury until specific charges had been made. But in the view we take of this case, we do not find it necessary to intimate any opinion as to that question in any of its branches, or as to the question *whether the reports of the Grand Jury*, in stating that they were engaged in investigating and inquiring into *certain alleged violations* of the Acts of 1887 and 1889 *by the officers and agents* of three specified railway and railroad companies, and the officers and agents of various other railroad companies having lines of road in the district (there being no other showing in the record as to what they were investigating and inquiring into), *are or are not consistent with the fact that they were investigating specific charges against par-*

ticular persons; because we are of the opinion that upon another ground the judgment of the court below must be reversed."

(*l.*) In *United States* v. *Kilpatrick*, 16 Fed. Rep., 765, Dick, *J.*, said:

> "In State courts, where common law jurisdiction over offenses is exercised, the powers and duties of grand juries are more extensive and responsible than in Federal courts, which have cognizance only of offenses defined and declared by acts of Congress; and there are special officers and agents appointed to make preliminary investigations of offenses against national laws. State grand juries have a general supervision over peace, good order, and well being of society, and may make presentments of offenses which are within their own personal knowledge and observation, or such as are of public notoriety and injurious to the entire community; but they cannot make inquisitions into the general conduct and private business of their fellow-citizens, and hunt up offenses by sending for witnesses to investigate vague accusations founded upon suspicions and indefinite rumors. The repose of society, as well as the nature of our free institutions, forbid such a dangerous mode of inquisition."

Judge Dick quoted with approval from Justice Field's charge (15 Am. L. Jour., 259) to the effect that grand jurors are limited in their inquiries to such *charges* as are called to their attention *by the Court*, or submitted to their consideration *by the District Attorney;* or such as may come to their knowledge in the course of their investigations of matter brought before them, or from their own observation; or such as may be dis- closed by members of the body. And this is in which accordance with the views expressed by this Court in the Frisbie case (*supra*) that although it is unimportant, how or by whom it is suggested, there must nevertheless be an "*alleged crime.*"

This rule was distinctly recognized in a compara-

tively recent case in the New York General Sessions, where Recorder Goff, in defining the powers of grand juries, said:

> "Except in special cases specified by law their power to inquire is limited to crimes committed or triable in the county. In order for them to exercise that power it must be made to appear by complaint or information or knowledge acquired that there is reason to believe that a crime has been committed. They have not the power to institute or prosecute an inquiry *on chance or speculation that some crime may be discovered.* Such an inquisition based upon mere suspicion would be odious and oppressive, and would not be tolerated by our laws. There must be reason to believe that a crime of a specific character has been committed by a particular person whose name may be either known or unknown to the Grand Jury. * * * They have not the power to summon a witness and examine him upon matters that are wholly unconnected with or related to the subject of inquiry. The process of the Grand Jury can be used only for the purpose of aiding a lawful inquiry, and it must not be used for the purpose of oppression or harassment."
>
> *Matter of Morse*, 18 N. Y. C. R., 312; 42 Misc., 664.

Judge Thomas' observations in the *Kimball* case, to the effect that the Grand Jury might institute an inquiry where no one was even suspected of a crime, were made in a case where the power of the Grand Jury to prosecute any kind of a general inquiry was not challenged; and the same is to be said of the other cases cited by the Government in the Court below.

(*m.*) Our system of law does not contemplate any inquiry into the commission of crime, except where some one is charged with it upon *allegations showing the existence of facts, which, if established by competent proof, constitute a violation of law.*

The possibilities of wrong and oppression under such a system as that contended for by the government in this case are beyond conception. The only safety lies in the application of those rules which deny the existence under our government of any merely *inquisitorial power* to hunt for crimes; and which declare that a grand jury is but a faculty to aid the criminal court in the discharge of its duties, and has no jurisdiction where the court itself has none.

As was said in *Lloyd* v. *Carpenter* (3 Pa. L. J., 188):

> "It is important also in the consideration of this question to be borne in mind that the body so to be clothed with these extraordinary functions is perhaps the only one of our public agents that is totally irresponsible for official acts. When the official existence of a grand jury terminates they mingle again with the great mass of other citizens intangible for any of the inofficial acts, either by private action, public prosecution or legislative impeachments."
>
> "That the action of such a body should be kept within the powers clearly pertaining to it is a proposition self-evident; particularly where a doubtful authority is claimed the exercise of which has a direct tendency to deprive a citizen of any of the guarantees of his personal rights secured by the Constitution. * * * This limitation of authority we regard as alike fortunate for the citizen and the Grand Jury. It protects the citizen from the persecution and annoyance which private malice or personal animosity introduced into the Grand Jury might subject him to. And it conserves the dignity of the Grand Jury and the veneration with which they ought always to be regarded by making them *the umpire between the accuser and the accused, instead of assuming the office of the former.*"

Every word of this quotation is strong and pertinent to the present case. But particular attention

is due the last words quoted, to wit, that it is the high province of the Grand Jury to act as umpire between the accuser—the executive and administrative department of the government on the one hand—and the accused on the other. The Grand Jury, whose functions are distinctly and exclusively *judicial*—not inquisitorial—should be the conservators of the liberty of the citizen, and see to it that no citizen is put to the expense, inconvenience and odium of a public criminal prosecution unless the accuser—the department charged with the duty of securing and presenting the evidence upon which the accusation is based—has made out a *prima facie* case. According to this—the correct view of the functions of a Grand Jury—the Grand Jury is entitled to the respect and veneration of all citizens, whereas according to the views of the District-Attorney in this case it is more to be dreaded than the Spanish Inquisition.

When we keep in mind the really important point, viz., that inquisitorial power is not judicial power at all, there is no difficulty in seeing the vice of those views.

(*n.*) The *reason* why a Grand Jury does not possess, and *cannot*, under the Constitution of this State exercise, purely *inquisitorial* power, is that such power is in no sense a *judicial* one.

An inquiry for the purpose of determining *whether* a crime has been committed, and if so, who is guilty of it, is a matter for the executive or administrative branch of the government. Until it is ascertained that a crime *has* been committed, and that there is probable cause to believe that some particular person has committed it, there is no occasion or justification for the exercise of judicial power.

One and perhaps the greatest of the evils incident to the administration of the Star Chamber was its inquisitorial method of procedure. Upon *suggestion* or *suspicion* citizens were subpœnaed to appear

before it and subjected to examination under the hateful *ex-officio* oath.

The preamble of the act for the abolition of that infamous Court (July 5, 1641; 16 Charles I., c. 10; 5 S. R., 110) recited among its usurpations the violation of the statute of 25 Edw. III. providing that "none shall be taken by *petition or suggestion* made to the King or to his council, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deeds be done, in due manner or by process made by writ original at the common law." And its inquisitorial methods were forever condemned by the declaration that its members should thereafter have no "power or authority to * * * do any judicial *or ministerial* act in the said Court," &c.

(*o.*) We need scarcely cite authorities in support of the proposition that a Grand Jury cannot legitimately exercise *non-judicial* powers. That an investigation for the purpose of determining *whether* a crime has been committed and, if so, who committed it, does not call for the exercise of any judicial power is, we submit, perfectly obvious.

There can be no exercise of *judicial* power unless there be *parties* to the proceeding, a matter in controversy, an assertion on the one hand and a denial on the other, and, in short, a distinct *issue* to be *determined.*

Judicial power is that which "adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the laws.

Cooley, Const. Lim., 132.

In the *Matter of Pacific Railway Commission* v. *Stanford*, 32 Fed. Rep., 241, it was held that the courts could not legitimately be made the instru-

ments for furthering an unwarranted legislative investigation.

The case arose upon an application of the Pacific Railway Commission for an order requiring a witness before it to answer certain interrogatories propounded to him. The commission was created under the Act of March 3, 1887, authorizing the President to appoint three commissioners to examine the books, papers and methods, and investigate the working, financial management, business and affairs of all railroad companies receiving Government aid, and also to ascertain and report

> "Whether any of the directors, officers or employees of said companies, respectively, have been or are now directly or indirectly interested, and to what amount or extent in any other railroad, steamship, telegraph, express, mining, construction or other business company or corporation, and with which any agreements, undertakings, or leases have been made or entered into; what amounts of money or credit have been or are now loaned by any of the said companies to any person or corporation; what amounts of money or credit have been or are now borrowed by any of said companies, giving names of lenders and the purposes for which said sums have been or are now required; what amounts of money or other valuable consideration, such as stocks, bonds, passes, &c., have been expended or paid out by said companies, whether for lawful or unlawful purposes, but for which sufficient and detailed vouchers have not been given or filed with the records of said companies; and further to enquire and report whether said companies, or either of them, or their officers or agents, have paid any money, or other valuable consideration, or done any other act or thing for the purpose of influencing legislation."

The act further authorized the Commission to require the attendance and testimony of witnesses and the production of books and papers, and to administer oaths, declared that the claim of self incrimination should not be allowed, no testimony given

before the Commission being assailable against a witness on the trial of any criminal proceeding, and further authorized the Federal courts to order contumacious witnesses to appear and produce papers, &c., and upon the refusal to do so to punish them for contempt.

In denying a motion for an order compelling a witness to answer certain interrogations, the Circuit Court for the Northern District of California said (per Field, *J.*):

> "The Pacific Railway Commission, created under the Act of Congress of March 3, 1887, is not a judicial body; it possesses no judicial powers; it can determine no rights of the Government or of the companies whose affairs it investigates. Those rights will remain the subject of judicial inquiry and determination as fully as though the commission had never been created; and in such inquiry its report to the President of its action will not be even admissible as evidence of any of the matters investigated. It is a mere board of inquiry, directed to obtain information upon certain matters and report the result of its investigations to the President, who is to lay the same before Congress.
>
> * * * * *
>
> Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security and that involves not merely protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right all other rights would lose half their value. The law provides for the compulsory production, in the progress of judicial proceedings or by direct suit for that purpose, of such documents as affect the interest of others, and also in certain cases for the seizure of criminating papers necessary for the prosecution of offenders against public justice, and only in one of these ways can they be obtained and their contents made known against the will of the owners."

Judge Sawyer, concurring, said:

> "A bill in equity that seeks a discovery upon general, loose and vague allegations is styled a 'fishing bill,' and such a bill would be at once dismissed on that ground (Sto. Eq. Pl., § 325, and cases cited). A general, roving, offensive, inquisitorial compulsory investigation, conducted by a commission *without any allegations, upon no fixed principles*, and governed by *no rules of law or of evidence*, and *no restrictions except its own will or caprice, is unknown to our Constitution and laws*, and such an inquisition would be destructive of the rights of the citizen and an intolerable tyranny. Let the power once be established and there is no knowing where the practice under it would end."

And Judge Sabin said:

> "Courts do not entertain such investigations or inquiries, or lend their aid thereto. If this power of unlimited, inquisitorial investigation into the affairs of private corporations or companies, or of individuals—and it concerns all alike—shall be once established, who can say where it will end or what will be its limit of injustice at all times, but more especially when called into exercise in times of political excitement, or under the influence of partizan zeal or passion?"

This case was cited with approval in Interstate *Commerce Commission* v. *Brimson*, 154 U. S., 447, where the 12th section of the Act of February 4, 1887, as amended in 1889 and 1891, was held to be constitutional and valid so far as it authorized the circuit courts to use their processs in aid of *duly authorized inquiries before the Interstate Commerce Commission.*

(*p.*) The learned Judge below in dismissing the writ said (Rec., p. 29):

> "It is manifest from the facts recited in the presentment made by the grand jury that the

> investigation which they were pursuing was not based upon any specific charge which had been formulated and laid before them by the United States Attorney, and that it was not founded upon their own knowledge, or upon information derived from any source that a specific offense had been committed by either of the two corporations named in the subpœna. It appears to have been one which they were pursuing with the assistance of the United States attorney, directed to the *discovery* of *some* infraction by one or both of these corporations of the law of Congress of July 2, 1890," &c.

He refers to Mr. Justice Brewer's language in the Frisbie case, *supra* (157 U. S., 160), and Judge Field's charge, *supra* (2 Sawy., 667), to the effect that a grand jury properly investigated any *alleged crime*, no matter how, or by whom suggested to them, in support of the proposition that

> "a grand jury has certain inquisitorial powers, and by this is meant the power of instituting an investigation to discover *whether* a *particular crime* has been committed;"

as to the extent and limitation of which, he adds, "there is a pronounced divergency of judicial opinion." After a review of the decisions, which he regards as fairly summarized in the 17 Am. & Eng. Enc. L. (2d Ed.), p. 1279 (*infra*), p. 22, he observes that, apart from the implication of Counselman *v.* Hitchcock, "the question, whether an improper exercise of the inquisitorial power subverts the jurisdiction of the Court, or is merely such an irregularity as to enable the accused or a witness to invoke the intervention of the Court, or as may vitiate an indictment, has never been decided."

His view is, however, that

> "When, after the presentment of the alleged contumacy of the witness by the Grand Jury to the Court he was ordered by the Court to answer questions and produce the documents, the action of the Court was equiv-

> alent to an express instruction to investigate *the proceeding mentioned in the presentment.*"

But the "proceeding mentioned in the presentment" was, as the learned Judge had already said, not a specific charge of any kind, but an inquiry "directed to the discovery of some infraction" of the statute.

Although, without the Court's intervention,

> "the investigation would have been one upon the border line between the legitimate exercise and the abuse of the inquisitorial power of the Grand Jury,"

it was, in the learned Judge's opinion,

> "not one which can be safely held to have been an ultra judicial proceeding. After the intervention of the Court the original abuse of power, if there was any, became innocuous."

The effect of this ruling is that while an inquiry begun in the absence of any charge of crime for the purpose of discovering whether or not some unknown and undesignated violation of a statute has been committed may be an abuse of power on the part of the Grand Jury, the Court may nevertheless by directing the Grand Jury to continue abusing its power render the past abuse, as well as its continuance, innocuous.

This might be true if the investigation were one which the Court had jurisdiction to entertain in the first instance. But our proposition is that there never can be jurisdiction in any court to direct a grand jury inquiry for purposes of discovery, or, in the absence of a specific allegation of crime.

The investigation prosecuted by the Grand Jury being *ultra-jurisdictional* and not merely "upon the border line between the legitimate exercise, and the *abuse* of the inquisitorial *power* of the Grand Jury," as asserted by the Circuit Court, it was not rendered innocuous by the intervention of the Court which, as we contend, had no power to direct the institution of the investigation originally.

(*q.*) The reasons for the complete separation of the legislative, executive and judicial departments

of our government system are many, but none can better suggest the underlying principle of this policy, so far as it applies to the case at bar than the thought so well expressed by Judge Grosscup in the case of United States *v.* James, 60 Fed. Rep., 257, 259, that

> "The theory of our criminal proceeding, like that of Great Britain, is accusatory and not inquisitorial."

Matters of pure inquiry, without a controversy, and which may, and presumably will be fruitless—for the presumption of innocence must assuredly outweigh the *suspicion* of a district attorney—are not subjects of *judicial* cognizance.

(*r.*) In concluding our discussion of this point, we beg to call attention to the pertinent language of Chief Justice MARSHALL in *United States* vs. *Hill*, 1 Brock. C. C., 159:

> "To suppose the powers of a grand jury, created not by express statute, but by the necessity of their aiding the jurisdiction of a court, to transcend that jurisdiction, would be to consider grand juries, once convened, to be clothed with powers not conferred by law, but originating with themselves. This has never been imagined."

FOURTH POINT.

A Grand Jury inquiry for the purpose of discovering whether or not the Sherman Act has been violated is not a "proceeding, suit or prosecution," under that act.

On February 25, 1903, Congress passed an Act appropriating the sum of five hundred thousand dol-

lars "for the enforcement of the provisions" of the Interstate Commerce Act, the Sherman Anti-Trust Act, and Sections 73 to 76, inclusive, of the Revenue Act of August 27, 1894. It was provided that the money should be

> "expended under the direction of the Attorney General in the employment of special counsel and agents of the Department of Justice to conduct *proceedings, suits and prosecutions* under said Acts in the courts of the United States."

Then comes the following provision:

> "*Provided*, That no person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, *in any proceeding, suit or prosecution under said Acts.*"

The question is whether this immunity applies to testimony given before the Grand Jury.

The following considerations tend to show that the immunity contained in the Appropriation Act of 1903 does not extend to testimony given before a grand jury—or at least not to testimony in any investigation like the present:

(*a.*) The constitutional guaranty against being forced to give incriminating testimony "must have a broad construction in favor of the right which it was intended to secure" (*Counselman* v. *Hitchcock*, 142 U. S., 547, 562).

It follows that any legislative substitute for it must be plainly adequate. A case of doubt should be resolved in favor of the witness. "We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating questions put to him can have the effect of supplanting the privilege conferred by the Constitution of the United States"

(*Counselman* case, p. 85). Here the immunity from prosecution as to any *transaction, matter* or *thing* concerning which testimony is given is made sufficiently broad. Similar language in the Act of February 11, 1893 (hereinafter referred to), was held to be a sufficient safeguard in *Brown* v. *Walker* (161 U. S., 591). But this immunity is worthless here unless the language subsequently used, "proceeding, suit or prosecution," embraces a grand jury investigation. If it does not, then the witness is deprived of his constitutional rights; and any reasonable doubt on this head should be resolved in his favor.

It cannot be questioned that a witness hereafter pleading the immunity afforded by this act as a bar to a criminal prosecution will be held to strict proof of the facts which constitute the bar. Especially will this be so when he seeks to plead this Federal statute as a bar to a prosecution in a State court for an offense committed against its sovereignty. It follows that in construing this statute, which is in derogation of his constitutional rights, every doubt must be resolved in his favor, so that he may have an assured equivalent for the constitutional protection which this statute by indirection takes from him. It may be too late now to urge a revision of that decision of this court which in effect sanctioned another statutory substitute for the same constitutional guaranty; but it is not too late to urge that no substitute, however phrased, be sanctioned unless such a construction of its language is imperative.

(*b.*) In the *Counselman* case the principal point decided was that Section 860 of the United States Revised Statutes, forbidding that any answer, discovery or evidence obtained from a witness in any judicial proceeding shall be given in evidence or in any manner used against him in a subsequent criminal proceeding is an insufficient substitute for the constitutional guaranty. About a year and a half

later Congress passed the Act of February 11, 1893, providing that no person shall be excused from testifying before the Interstate Commerce Commission or

> "in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation"

of the Interstate Commerce Law on the ground that his evidence might tend to incriminate him, but that

> "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, before said Commission or in obedience to its subpœna * * * *or in any such case or proceeding.*"

In *Brown* v. *Walker* (1895) which involved the refusal of a witness to testify before a Grand Jury upon an investigation growing out of an alleged violation of the Interstate Commerce Law, both counsel and Court assumed, without question or discussion, that the Act of 1893 applied to such an investigation, and the Court held that in view of the immunity afforded by that Act the witness was not privileged to refuse to answer self-criminating questions put to him before the Grand Jury. The Court, however, did not consider in that decision whether Congress by the Act of 1893 intended to make any reference to Grand Jury investigations. This is evident from the fact that both in the prevailing opinion and in the dissenting opinion of Shiras, *J.*, the words "or in any cause or proceeding, criminal or otherwise, based upon or growing out of the Act" are omitted from the quotations (pp. 593, 610) which both judges make from the Act of 1893.

No question is now made as to whether Congress by the words used in the Act of 1893 "any cause or proceeding, criminal or otherwise, based upon or

growing out of the Act" intended to refer to Grand Jury investigations. But it is significant that after this court, in *Brown* v. *Walker*, without discussion of the language used, had applied the Act of 1893 to the case of a witness before a Grand Jury, Congress in the Act of 1903 avoided the use of the words which had been employed in the Act of 1893, viz., "in any cause or proceeding, criminal or otherwise, based upon or growing out of the Act."

If Congress by the Act of 1903 had intended to grant immunity to witnesses testifying to self criminating matters before grand juries its course was plain. It had but to use the words employed in the Act of 1893 which had already been applied by this Court to grand jury investigations. It did not do so. Furthermore, the failure to use in the Act of 1903 the words which had been employed in the Act of 1893 was not due to inadvertence. The rest of the language employed in the immunity clause of the Act of 1903, was copied verbatim from the Act of 1893, viz.: "No person shall be prosecuted or (be) subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise"--At this point there was a deliberate and most significant departure from the words which in *Brown* v. *Walker* had been assumed to embrace Grand Jury investigations.

But there is convincing internal evidence in the Act of 1903 apart from this that it was framed with special reference to the decision in *Brown* v. *Walker*, and with full appreciation of the effect of that decision, for on the sole authority of that decision Congress omitted from the Act of 1903 as unnecessary the words which had been employed in the Act of 1893, and theretofore in all similar statutes, viz., that "No person shall be excused from testifying" as to self-criminating matters, &c.

It may be said, therefore, with confidence that in the Act of 1903 Congress deliberately, intentionally and advisedly avoided the use of the language which this Court, in construing the Act of 1893, had assumed to embrace grand jury investigations. This deliberate, intentional and advised action of Congress, we submit, is inexplicable except on the theory that Congress, in using the language of the Act of 1903, did not contemplate that the statute should be construed as applicable to grand jury investigations, but, on the contrary, intended that it should not be susceptible of any such construction.

The reasons which would naturally have inclined Congress to refrain from embracing grand jury investigations within the purview of the Act of 1903 are manifest. The views of the four dissenting justices in *Brown* v. *Walker* called forcibly to the attention of Congress the particulars in which the immunity afforded by the Act of 1893 might not be an equivalent for the protection afforded by the constitutional guaranty, and it was pointed out specially in the dissenting opinion of Mr. Justice Shiras that it was not a matter of perfect assurance that a person who has compulsorily testified before a grand jury will be able, if subsequently indicted for some matter or thing concerning which he testified, to procure the evidence that will be necessary to maintain his plea. The investigations of grand juries are in secret. An oath binds each grand juror to secrecy. No one is allowed to be present but the grand jurors, the representative of the government and the witness. The witness is not entitled to the presence of counsel. No friends can be present, as in every other investigation known to our laws, by whom he may prove the transactions, matters and things concerning which he gave evidence before the Grand Jury whenever occasion arises to use that evidence as a bar to a criminal prosecution. He cannot have his own stenographer present, as in every other investigation known to our laws, from whose notes he can

prove with precision exactly what took place before the Grand Jury whenever an occasion arises to do so; and except on rare occasions, as in the present instance, the government has none present; and the presence or absence of an official stenographer is, of course, optional with the government. The life of the Grand Jury itself is ephemeral. When its short term of service is over its members are dispersed and scattered. As a rule, they leave behind no record, except indictments found and not found, of any proceeding or complaint which has been before them or of any evidence which has been given before them. The recollection of the grand jurors themselves may prove too indistinct and unreliable to be of service to the witness in proving his plea, for they have no such motive as he has to observe and remember the details concerning which he testified and gave evidence. The result may be that when he moves to quash the indictment he may have only his own oath in support of his motion and against him will probably be arrayed the affidavit of the United States Attorney and of every grand juror that they have no recollection of any such occurrence as that to which he deposes.

This is what might well occur in case the witness were indicted by a State Grand Jury after a Federal Grand Jury investigation in the same district. But imagine the difficulties of the witnesses' situation if months or years after a Federal inquiry in New York he were indicted in some remote county in California for something regarding which he had testified before the New York Grand Jury.

We may say, in addition to all this, that where, as in the case at bar, there is no *charge*, no framed bill of indictment, nothing but the mental processes of the Government's attorney by which to measure or determine the scope and purpose of his voyage of discovery, and merely his *assertion* as to what it is, and what law it is "*under*," no witness could even lay *the foundation* for his plea of immunity.

The peril to which a witness before a Grand Jury is thus exposed by the withdrawal of his constitutional guaranty is not fanciful, improbable or remote. The Kansas statute compelling witnesses to give self-criminating testimony before grand juries (Gen. Stat., 1901, Sec. 7378), recently construed by this Court in *Jack* v. *Kansas*, contained this provision:

> "The evidence of all witnesses so subpœnaed shall be taken down by the reporter of said court and shall be transcribed and placed in the hands of the county attorney or the attorney general."

There a witness would have a protection which he has not under the Federal statute.

These considerations were quite sufficient to incline Congress to extend no further the requirement that witnesses must must give self-criminating evidence before grand juries, and to so frame the Act of 1903 as not to embrace grand jury investigations. And the fact is that for ten years after the passage of the Act of 1893, which applied only to causes and proceedings, criminal or otherwise, based on or growing out of the Interstate Commerce Act, Congress, while leaving the Act of 1893 on the statute book, made no attempt to extend any of its features to the Sherman Anti-Trust Law or to the Anti Trust sections of the Revenue Act, and when it passed the Act of 1903 it deliberately and intentionally made use of language very different from that employed in the Act of 1893.

It is equally obvious that the considerations above noted might not incline Congress in dealing with the Interstate Commerce Law to qualify the language which, in *Brown* v. *Walker*, had been assumed to include Grand Jury investigations. We find that in the Act of February 19, 1903 ("An Act to further regulate commerce with foreign nations and among the States," being a supplement to the Interstate Commerce Law), Congress employed lan-

guage evincing its intention to continue the broad and sweeping scope of the Act of 1893 with respect to Grand Jury investigations into alleged violations of the Interstate Commerce Law. The reason why in the act passed but six days later there was so marked a change of language is plain. This court had pointed out the remoteness of the danger from subsequent prosecutions to be apprehended by a witness even before a grand jury when called to testify concerning alleged violations of the Interstate Commerce Law. The matters which constitute violations of the Interstate Commerce Law could scarcely be the subject of State regulation, and the chance of a State prosecution for other causes arising out of disclosures before Federal grand juries so remote as to be negligable. But every State has its anti-trust laws, either in the form of specific statutes directed against combinations in restraint of trade, or statutory or common-law conspiracy provisions covering every form of unlawful agreement to commit acts injurious to trade and commerce, so that it is almost impossible to conceive of any violation of the Federal anti-trust laws which would not also involve a violation of the anti trust laws of the State in which it was committed.

(*c.*) What then did Congress mean by the language employed in the immunity clause of the Act of 1903, viz., "any proceedings, suits or prosecutions"?

The first three sections of the Sherman Anti-Trust Law declare certain things to be misdemeanors; the fourth section provides for what are therein called "*proceedings in equity* to prevent and restrain" violations of the Act; the fifth section provides for bringing in additional parties to "any *proceeding*" under Section IV.; the sixth section provides for what are therein called "*proceedings*" for the seizure and condemnation of property used in violating the Act; and the seventh section provides for

what is therein called a "*suit*" by any one injured by a violation of the Act to recover threefold damages.

Obviously, the draughtsman of the Act of 1903 had before him the text of the Sherman Anti-Trust Law and adopted from it, without a change of meaning, the words "proceedings" and "suits," and added the new word "prosecutions" only because "misdemeanors" was inappropriate for his purpose. By "proceedings" he meant "*proceedings in equity* to restrain violations of the Act and *proceedings* for the seizure and condemnation of property used in violating the Act; and he was thinking of nothing else so far as the Anti-Trust statute was concerned. By "suits" he meant suits by injured parties to recover threefold damages under the Act; and by "prosecutions" he meant criminal prosecutions for violations of the Act. He found that these words were also appropriate, when applied to the Interstate Commerce Act and to the Anti-Trust sections of the Revenue Act, to designate the specified proceedings, suits for damages and prosecutions under those Acts, and he, therefore, had no occasion to use any others. But he evidently first found them in the Anti Trust statute and appropriated them without change of meaning. Therefore, the proceedings referred to in the Act of 1903 are the specific proceedings provided for in each of the three Acts mentioned.

It is true that the word "proceeding," if used in its generic sense, has a very broad meaning—sufficiently so, indeed, to include both "suit" and "prosecution." Obviously it was not used here in that broad sense, for if so the subsequent use of the words "suit" and "prosecution" would have been worse than surplusage.

Neither can it be construed as a drag net intended to cover anything of the same general nature as a "suit" or "prosecution" or ancillary thereto, but not strictly within those terms, for such a meaning can be assigned only when it follows an enumeration,

and not when it is the first of several enumerated terms.

Standing as it does here the first, and therefore the most conspicuous, of three enumerated coordinate terms, it should, if possible, be assigned a meaning as precise, as narrow and as descriptive of a definite independent thing as either of the other enumerated terms. That is its natural and ordinary meaning as here used. Now proceedings in equity to restrain violations and confiscation proceedings were the most conspicuous remedial features of the Anti-Trust Law. The two other remedial features were suits and prosecutions. What more natural than to mention these three remedial features in the language here used as "proceedings, suits or prosecutions," meaning thereby specified proceedings under the Act, suit for damages under the Act, and prosecutions under the Act.

These views find support in the authorities.

In *Windt v. Banniza*, 2 Wash., 147, the Court was considering a statute permitting appeals "in all actions and proceedings." It will be noted that there the word "proceedings" did not precede, but followed, the word "actions." The Court said:

> "We are of the opinion that the word 'proceedings' in contradistinction to 'actions' must be taken to include not the orders of the Court in matters arising in the progress of the action, or merely incident or ancillary thereto, but only those matters outside of ordinary actions and commonly known as special proceedings. * * * Ordinarily speaking, every step taken in an action is a proceeding. * * * We do not believe the legislature intended that the word should be understood in any such sense" (pp. 153–4).

In the case at bar the word "proceeding" is associated not with the word "action," but with the similar word, "suit," and it is natural to give it the meaning of proceeding in equity under the Act, pro-

ceeding for seizure and condemnation under the Act, &c., as distinguished from something merely incidental to a suit. Indeed, as already pointed out, where the word "proceeding," instead of following, precedes the other enumerated terms it is impossible to consider it as something merely incidental to the two other enumerated terms.

It is natural to construe the word "proceeding" as relating to the enforcement of the *civil* right or remedy, since many such proceedings are specified in the acts in question. But even if the language used had been "criminal proceedings" it would still not cover this Grand Jury investigation

In *Post* v. *United States* (161 U. S., 583) the statute of July 12, 1894 (2 Stat., 102), was under consideration. It provides that

> "All criminal proceedings instituted for the trial of offenses against the laws of the United States, arising in the District of Minnesota, shall be brought, had and prosecuted in the division of said district in which such offenses were committed."

The act took effect from the date of its passage, July 12. The June term of the Grand Jury for the District of Minnesota, 1894, was impanneled on July 5, and continued in session until July 20. On this last date it returned two indictments against Post.

> "All the persons whose names were endorsed upon the indictments were duly summoned in these cases, before the Grand Jury, prior to July 5, 1894, and in obedience to such summons were in actual attendance upon the Court prior to July 12, 1894" (p. 584).

Post demurred to the indictments on the ground that the matters and things set forth in them were offenses alleged to have been committed in the Fifth Division of the District, while the indictments were found outside of that division. The demurrer was

overruled. The defendant was convicted and the judgments of conviction reversed. This Court said:

> "The point of time at which the act is to apply to a particular case is not the time of committing the offense, but the time of instituting the proceedings. Treating the direction as operating prospectively only, that 'all criminal proceedings instituted' 'shall be brought, had and prosecuted' in a particular division, it obviously includes all proceedings which shall be, and none which have been, instituted. Without regard, therefore, to the time of the commission of the offense, all the proceedings for its prosecution, if instituted after the Act of 1894, took effect, must be in the division in which the offense was committed; but if instituted before this act took effect they might go on as under the earlier acts in any division * * * Criminal proceedings cannot be said to be brought or instituted until a formal charge is openly made against the accused either by indictment presented, or information filed in court or at the least by complaint before a magistrate * * * The submission of a bill of indictment by the attorney for the Government to the grand jury and the examination of witnesses before them are both in secret, and are *no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced.*"

Neither is an inquiry before a grand jury a "suit" or a "prosecution." That it is not a suit is too obvious to require argument or citations. It is just as certainly not a "prosecution."

U. S. Const., Amend. VI.
Post v. *U. S.* (*supra*).
Virginia v. *Paul*, 148 U. S., 107.
State v. *Wolcott*, 21 Conn., 279.

If inquiries by grand juries are "criminal prosecutions" what becomes of the Constitutional requirement that "In all *criminal prosecutions* the

accused shall enjoy the right to a * * * public trial * * * to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." The secrecy of the grand jury room could not be maintained under this provision if grand jury inquiries were criminal prosecutions. It is evident, therefore, that the founders of the Constitution did not consider the prosecution begun until the indictment was found.

This is a sound view, for until indictment found the grand jury is not a prosecuting body but an inquiring body. It is one of the historical bulwarks of the liberties of the individual—a protection to the subject or citizen against unjust prosecution, and as such it is referred to in the Fifth Amendment.

There can be no prosecution for a capital or otherwise infamous crime until a grand jury has determined that there is reasonable ground for such prosecution. This was the meaning of the Constitution. The Grand Jury investigation was a necessary prerequisite to a criminal prosecution, but it was no part of that prosecution.

Post v. *United States* (*supra*), expresses the same views. Criminal proceedings as there used were considered as embracing and indeed co-extensive with the criminal prosecutions, and it was held that the criminal proceeding was not begun until the indictment was found. The Court said (p. 587):

> "Submission of a bill of indictment * * * to the Grand Jury and the examination of witnesses before them * * * are *no part of the criminal proceedings* against the accused."

In *Virginia* v. *Paul*, 148 U. S., 107, it was said by this Court, in construing the Removal Act, Sec. 643 of the Revised Statutes, by Gray, *J.* (p. 119):

> "Proceedings before a magistrate to commit a person to jail or to hold him to bail in

> order to secure his appearance to answer for a crime or offense, which the magistrate has no jurisdiction himself to try, before the Court in which he may be prosecuted and tried are but *preliminary to the prosecution* and are no more a commencement of the prosecution than is an arrest by an officer without a warrant for a felony committed in his presence."

In *State* v. *Wolcott*, 21 Conn., 272, it was held, and, of course, necessarily, *Church, Ch. J.*, writing the opinion, that the provision of the Connecticut bill of rights that "in all criminal prosecutions the accused shall have the right to be heard by himself and by counsel * * * to be confronted by the witnesses against him, and to have compulsory process to obtain witnesses in his favor" had "never been understood to apply to Grand Jury enquiries."

But whatever word may be appropriately used to describe the investigation by a Grand Jury of a specific complaint against a specified individual, there can be no question that it would be an abuse of language to apply the term "prosecution" to the inquiry which was being conducted by the Grand Jury in the case at bar, where there was no specific complaint against any specified person, and where the investigation was conducted for the sole purpose of "discovering" whether or not there had been some violation, to them unknown, of the Sherman Anti-Trust Act.

(*d.*) It has been urged on behalf of the Government as an argument of "utility" that a construction of the Act of 1903, which would make it inapplicable to grand jury investigations, would clearly defeat the obvious purpose of the Sherman Act.

The objection is unsound. The construction of the act for which we contend may be an obstacle in the way of perverting the machinery of the grand jury to improper uses, but it will not interfere with

an efficient enforcement of the prohibitions of the act.

The complete success of the Government in the *Trans-Missouri* (166 U. S., 290) *Joint Traffic* (171 U. S., 505) *Addyston Pipe* (175 U. S., 211) and *Northern Securities* (193 U. S., 197) cases without the aid of a grand jury investigation in itself proves that public officers can enforce the provisions of the Sherman Act, in all its branches, without any benefit from the Act of 1903, and certainly without the benefit of the unwarranted construction which the Government seeks to place upon that Act. And if after the determination of these cases there had been any desire to prosecute any one for the misdemeanors which they disclosed, the way to do so was open and clear of obstacles, and the evidence was at hand and available.

The objection loses sight of the fact that the chief remedial features of the Sherman Act were proceedings or suits in equity to restrain violations of the act, and proceedings for the seizure and condemnation of "any property owned under any contract, or by any combination, or pursuant to any conspiracy (and being the subject thereof), mentioned in Section 1."

Where no overt act has been committed in violation of the Sherman Law to the prejudice of the public, there is no occasion for any prosecution, civil or criminal. And where there has been an overt act in violation of the law, if a proceeding in equity to restrain the violation does not afford a sufficiently effective means for stopping the abuse and laying the foundation for a criminal prosecution, certainly the confiscation of the corporate property does. In the former proceeding the Government has the fullest opportunity of obtaining evidence at its leisure, step by step, before a master, and of compelling the production of incriminating evidence and papers when that is deemed desirable. If, in the course of that proceeding, it is discovered that any specific crime has been

committed by any specific person or corporation in violation of the Sherman Law, the Government may then lay that evidence before a federal grand jury and ask for an indictment. Nor will there then be any obstacle in the way of compelling the witnesses who have testified in the proceeding in equity from repeating their testimony word for word, *viva voce*, before the grand jury. Having given their testimony once publicly in the proceeding in equity, where every word uttered is recorded, no witness can be thereafter prosecuted for any transaction, matter or thing as to which he so testified and so cannot object, on the ground of self-crimination, to repeating that testimony before a grand jury.

The grand jury will then be engaged in the exercise of its legitimate functions, the weighing of evidence against the accused, already known to the prosecuting officer, for the purpose of determining whether an indictment can properly be based upon that evidence. They will not then be called upon to act as a detective bureau or police office, rummaging through private papers of, perchance, innocent parties to discover whether or not something cannot be found in some paper which will fix upon some person some possible crime.

No violation of the Sherman Law is made by that law more serious than a misdemeanor. In the case of a corporation the extreme penalty is a fine of five thousand dollars. Does this not of itself show that criminal prosecutions under the Sherman Law were a secondary and comparatively unimportant remedial feature of that act, and that it was contemplated that they should be resorted to only when there was in the hands of the Government direct evidence of the commission of a specific violation of the act by a known person—a situation which would always follow in the wake of a successful proceeding in equity to restrain a violation, or after the more drastic measure of seizure and forfeiture.

The Government seemingly would transpose the order of procedure contemplated by Congress. It

would use a grand jury investigation for the ostensible purpose of discovering evidence on which it could recover from a corporation a paltry fine, and then, perhaps, thereafter make that evidence the basis, as Congress never intended it should be, of the really serious remedies by way of injunction or forfeiture. With great respect it is urged that they should pursue the same course which Congress marked out, by directing their attention to restraining overt violations of the Sherman Law, seizing and condemning the property of offenders, and then when they have legal proofs in hand, prosecuting individuals on indictments properly found, based on evidence submitted by the United States Attorney in support of definite charges made by him against specific individuals.

The construction of this act for which we contend does not thwart any purpose of Congress, but really effectuates the legislative intent.

FIFTH POINT.

The Act of February 25, 1903, is unconstitutional and void in that it undertakes to deprive the various States of the United States of their sovereign right and power to prosecute and punish persons concerned in transactions, matters and things which violate their own laws, thus infringing upon the provision of the Tenth amendment to the Constitution of the United States that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

A view contrary to this contention was expressed in the prevailing opinion of this Court in *Brown*

v. *Walker, supra.* In that case there was considered an investigation of the charge that certain railroad companies had violated the Federal Interstate Commerce Act. In opposition to the contention that the Federal statute was not adequate in its immunity, because there was a possibility that the witness would disclose in his testimony transactions which involved violations of State laws, the Court held that the probability of a prosecution under any State law on account of any transaction with respect to which the witness is compelled to answer is so remote as to be a negligible quantity; and, moreover, that since the Constitution provides that the Constitution itself and the laws enacted in accordance with it shall be the supreme law of the land, an immunity from prosecution, or pardon extended by congressional enactment, is effective even as against a prosecution by the State authorities for a violation of a State statute.

The second of these grounds was not necessary to a decision of the case; the first was unquestionably sufficient to warrant the decision, for there was in that case a most remote probability that the witness would be called on to defend a State prosecution on account of any transaction disclosed by him. He was being examined relative to alleged infringements of the Interstate Commerce Law—No State has, nor can it have, any analogous criminal statute. It was conceivable, of course, as argued in that case by the witness' counsel, that his testimony would bring to light an embezzlement committed by himself, or a larceny, or, perchance, a murder—conceivable, but so remote in its probability as not to be worth considering.

The view expressed by the majority of the Court in *Brown* v. *Walker*, that Congress may constitutionally and effectively pardon offenses committed against the valid criminal statutes of the States has not been definitely adopted or affirmed by any subsequent decision, and the words used in an opinion

very recently delivered (*Jack* v. *Kansas, decided November 27, 1905*) indicate that it was the improbability of State prosecution, rather than the efficacy of the immunity against such State prosecution, that was decisive of *Brown* v. *Walker*. Speaking of that case, this Court, through Mr. Justice Peckham, says:

> "While it was asserted that the law of Congress was supreme, and that judges and courts in every State were bound thereby, and that therefore the statute granting immunity would *probably* operate in the State as well as in the Federal courts, yet still, and aside from that view, it was said that while there might be a bare possibility that witness might be subjected to the criminal laws of some other sovereignty, it was not a real and probable danger, but was so improbable that it needed not to be taken into account."

The case from the opinion in which this quotation is made (*Jack* v. *Kansas*) was one in which the probability of prosecution in another jurisdiction, or by another sovereignty was remote as compared with the case at bar. In that case certain owners of coal mines located in Kansas were charged with having combined to fix the price of coal at the mines, and the price to be charged to purchasers in violation of the Kansas Anti-Trust Law. The witness was asked as to the existence of any agreement between the coal operators with regard to fixing the price of coal to be sold to residents and citizens of Kansas. It was conceded that the State immunity statute was sufficient to protect the witness against any prosecution in the Courts of that State. Considering the limitations on Federal jurisdiction, and the nature of the business in which the defendants were engaged, and the carefully limited scope of the questions put to the witness, it is apparent that the danger to the witness of revealing a transaction that would subject him to Federal indictment and prosecution

was, to say the worst, not imminent. Whether or not such danger was so remote and unsubstantial as to justify its being treated as negligible, might very well be a matter about which there could arise a difference of opinion, and a difference of opinion did arise in this court.

But there can be no difference of opinion as to the practical danger to this appellant of a prosecution under the laws of the State of New York, in the courts of New York, on account of transactions about which he is asked to testify. It sufficiently appears from the record that the Grand Jury was engaged in some inquiry having for its object the discovery of whether or not violations of the Sherman Act had been committed within the Southern District of New York. There is a statute in that State (Laws of 1899, Ch. 690; Birdseye's Rev. St. of N. Y., 3d Ed., p. 2405) which condemns not only any corporation, but any officer or agent thereof who makes, or attempts to make, or enter into any agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in the State of any article or commodity of common use is, or may be, created, established or maintained, or whereby competition in the State may be restrained or prevented. This statute provides that the corporation may be fined, and the officer or agent fined or imprisoned, or both, for each violation. It is manifest that if the appellant's answers to the questions asked throw light upon a violation by his corporation of the Sherman Anti-Trust Law, they will by the same light reveal a violation by him and his corporation of this Donnelly Anti-Trust Law, which has full force and effect, and frequent enforcement, in the State courts of New York.

Circuit Judge Van Devanter, in his remarkably lucid oral opinion delivered recently in the *Paper Trust* case, now on appeal to this Court, recognized the practical danger that a witness in an investiga-

tion under an Anti-Trust Law encounters of a prosecution under a State law:

> "Now it is also said—and that argument addressed itself to me with great force – that intrastate and interstate transactions are so commingled in carrying into effect a combination such as is here alleged, that the disclosure of that which is interstate will necessarily be accompanied by the disclosures of that which is intrastate; that it happens in this instance that if there be such a combination it is unlawful not only in respect of that which is interstate, but also in respect of that which is intrastate, and that, therefore, the disclosure would subject the witnesses to prosecution both under the Federal statute and under the State statute."

Can any one say it is practically impossible, or even unlikely, that if under the Knight case, or some other adjudication, it is found impracticable to convict defendants of any breach of the Sherman Anti-Trust Law, the Attorney General in New York will direct a prosecution under the Donnelly Anti-Trust Law of that State against the corporation and its directors for the offense which appellant may have testified to before the Federal Grand Jury?

There is then a very real danger to the witness, and his immunity exists only in name, unless it is a sound proposition that under our system of government a man armed with a Congressional pardon may defy the State authorities in their efforts to punish him for a crime against the peace and dignity of the State. It is not intended to argue elaborately against that proposition.

It seems to give to the Federal legistature a supremacy never intended by the framers of the Constitution—a right to nullify the efforts of a State to maintain peace and good order and good morals within its own borders.

If this court intended to hold in *Brown* v. *Walker* that the Federal legislature possessed this power, we, of course, bow with respect to its decision. But if,

on the other hand, the Court did not so intend, but left the question open, merely intimating its view, as Mr. Justice Peckham's opinion in the *Jack* case seems to indicate, that "the federal statute would *probably* operate in the State as well as the Federal courts," then since it is fairly presented in the case at bar, we ask for a determination of this most important question.

SIXTH POINT.

The order of May 5th, requiring the appellant to produce the papers called for by the subpoena duces tecum, was made in violation of his rights and the rights of the MacAndrews & Forbes Company under the Fourth Amendment.

The ancient English practice of arresting persons under general warrants, without previous evidence of their guilt or identification of their persons, and of searching for and seizing private papers in the hope that they might disclose evidence incriminating the owner, survived the English Revolution, and was continued without question, on the ground of *usage* (precisely as in the case at bar the Government undertakes to justify inquisitorial grand jury investigations on the ground that they are permitted by the common practice of the times) until the reign of George III., when it received its death blow in the decision of Lord Chief Justice Camden in the celebrated case of *Entick* v. *Carrington*, 19 How. St. Tr., 1029.

In an account dealing with the final overthrow of the practice, in vogue so many generations notwithstanding its illegality, May, in his admirable work on the Constitutional History of England (Chap.

11), describes the embarrassment in which Lord Halifax found himself upon the publication of No. 45 of the *North Briton*. He so perfectly depicts the attitude of the learned counsel for the government in the present case that we may be pardoned if we quote:

> "There was a libel, but who was the libeller? Ministers knew not, nor waited to inquire after the accustomed forms of law; but forthwith Lord Halifax, one of the secretaries of state, issued a warrant, directing four messengers, taking with them a constable, to search for the authors, printers and publishers; and to apprehend and seize them, together with their papers, and bring them in safe custody before him. No one having been charged or even suspected—no evidence of crime having been offered, no one was named in this dread instrument. The offense only was pointed at, not the offender. The magistrate who should have sought proofs of crime deputed this office to his messengers. Armed with their roving commission, they set forth in quest of unknown offenders; and, unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they were pleased to suspect. Nor were they triflers in their work. In three days they arrested no less than forty-nine persons on suspicion—many as innocent as Lord Halifax himself. Among the number was Dryden Leach, a printer, whom they took from his bed at night. They seized his papers, and even apprehended his journeymen and servants. He had printed one number of the 'North Briton,' and was then reprinting some other numbers; but as he happened not to have printed No. 45, he was released without being brought before Lord Halifax. They succeeded, however, in arresting Kearsley, the publisher, and Balfe, the printer, of the obnoxious number, with all their workmen. From them it was discovered that Wilkes was the culprit of whom they were in search; but the evidence was not on oath; and the messengers received verbal direc-

> tions to apprehend Wilkes under the general warrant. Wilkes, far keener than the crown lawyers, not seeing his own name there, declared it 'a ridiculous warrant against the whole English nation,' and refused to obey it. But after being in custody of the messengers for some hours, in his own house, he was taken away in a chair, to appear before the secretaries of state. No sooner had he been removed than the messengers, returning to his house, proceeded to ransack his drawers, and carried off all his private papers, including even his will and pocket book. When brought into the presence of Lord Halifax and Lord Egremont, questions were put to Wilkes which he refused to answer; whereupon he was committed close prisoner to the Tower, denied the use of pen and paper, and interdicted from receiving the visits of his friends, or even of his professional advisers."

The distinction between the methods employed against the appellant and those adopted against the victims of Lord Halifax's wrath, is, however, that *there* there was a libel, whereas *here* there is not even a charge of crime, or anything more than speculation, that perhaps some crime may be discovered. In all other particulars the cases are identical from a legal standpoint so far as the personal restraint of individuals is concerned—arrest and imprisonment under a warrant, and the restraint and invasion of the right of privacy imposed by a subpœna being equally a deprivation of liberty. The only other difference is that Lord Halifax's messengers actually searched for and seized papers, whereas here the Court's order merely gave the petitioner the choice of producing them forthwith or submitting to imprisonment until he did.

Wilkes questioned the legality of these general warrants and carried the matter to the courts, with the result that in 1765 Lord Camden's famous decision was rendered declaring the warrants illegal

and void. Of this decision, Mr. Justice Bradley said in the *Boyd* case (116 U. S., 616, 626–7):

> " As every American statesman during our revolutionary and formulative period as a nation was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizure."

The broad principle laid down in Lord Camden's opinion was that what is not to be found in the books is not law, and, therefore, that every invasion of private property is a trespass, and must be justified or excused by some positive law.

After describing the power claimed by the Secretary of State for issuing general warrants, and the manner in which they were executed, Lord Camden said:

> "Such is the power, and, therefore, one should naturally expect that the law to warrant it should be clear in proportion, as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law.
>
> "The great end for which men entered into society was to secure their property. That right is preserved, sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, &c., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be

nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books, and if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

"Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

"But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall intitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.

"The case of searching for stolen goods crept into the law by imperceptible practice.

It is the only case of the kind that is to be met with. No less a person than my Lord Coke denied its legality, 4 Inst., 176; and, therefore, if the two cases resembled each other more than they do, we have no right, without an act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description.

"If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory and deliver a copy; my answer is, that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing."

After showing that these general warrants for search and seizure of papers had their origin in the Court of Star Chamber, and never had any advocates in the common law courts except Chief Justice Scroggs and his associates, Lord Camden adds:

"Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to

> get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery and housebreaking—to say nothing of forgery and perjury—that are more atrocious than libelling. But our law has provided no paper search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle. There, too, the innocent would be confounded with the guilty."

Lord Camden concluded thus:

> "I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of the opinion that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void."

Said Mr. Justice Bradley, after quoting the foregoing extracts from Lord Camden's opinion (116 U. S., 616, 630):

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the Court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where

that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

The Fourth Amendment is as follows:

"The right of the people to be secured in their persons, houses, papers and effects against unreasonable searches and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

In the *Lester* case (77 Georgia, 143), from which we quoted under a previous point, the Supreme Court of Georgia said:

"It is the right of any citizen or any individual of lawful age to come forward and prosecute for offenses against the State, or when he does not wish to become the prosecutor, he may give information of the fact to the grand jury, or any member of the body, and in either case it will become their duty to investigate the matter thus communicated to them, or made known to one of them, whose obligation it would be to lay his information before that body. This, however, differs widely from forcing a person to reveal his knowledge to the inquest. The latter process is in the nature of an unlawful search, against which citizens are protected by constitutional provisions. Neither houses, nor desks, nor secretaries, nor other places of deposit, can by such general proceedings be opened and rifled of their contents, for the purpose of enabling

> the grand jury *to find out whether a crime had been committed, with a view of presenting it.* General warrants, issued for accomplishing such a purpose, are absolutely void, and will afford no protection to any officer or party engaged in their execution, when called upon to answer for an invasion of personal rights under such circumstances."

Manifestly no less stringent a rule applies to the issuance of a *subpœna duces tecum* than to the ordinary *subpœna ad testificandum;* yet the Supreme Court of Pennsylvania said, in speaking of the latter form of process:

> "As this writ is a very arbitrary one, obliging the citizen to leave his home and abandon his business, however important it may be, and give his attendance at court, wherever that may be sitting, it is very important to know what parties are entitled to it; for if it be issued at the suit of one having no right thereto, it is no contempt to disobey it. The Commonwealth may have this process in any proceeding *where its interest is apparent,* whether as a suitor or a prosecutor, and so may *parties* in courts, either civil or criminal; *but we have yet to learn that any such right exists in a court, in its mere character as a court, separated from the case which it has in hand.*"
>
> *Appeal of Hartranft,* 85 Pa. St., 433.

Although the subpœna in the case at bar is in form the writ and process of the Court, under its seal, signed by the clerk, tested in the name of the Chief Justice, and purports to have been issued in the course of a duly instituted judicial proceeding, the fact is, as the record clearly shows, that when it was prepared and served, and when in obedience to its terms the petitioner presented himself before the Grand Jury, there was no judicial matter of any kind pending in the Court, or before the Grand Jury; and it is equally clear that the origin of the subpœna, and the only pretext for its issuance, was the desire of

the learned Assistant District Attorney to ascertain, by interrogating the appellant, and by inspecting the private papers and documents of the corporation of which he was secretary, whether or not that corporation, and another, or either of them, had or had not, in some way unknown, violated the Sherman Act. Neither of these corporations was charged by anyone with having committed any particular act or acts denounced as criminal by that statute. No one had filed any sworn accusation against them before any court or magistrate. No bill of indictment had been drawn and submitted to the grand jury. So far as the record shows they were not even *suspected* of crime. But because, and solely because, the legal representatives of the government thought, or imagined, or had perhaps been told by some business rival of one or both of these companies, or some individual cherishing a fancied grievance, that if the appellant was questioned and compelled to reveal his company's private business affairs and secrets, and submit their books and papers to the prying eyes of the government's representatives, it might be discovered that at some time or place the MacAndrews and Forbes Company had, in some manner, violated some provision of the Sherman Act, the Clerk of the Circuit Court, upon the request of the United States Attorney, signed and affixed the seal of the Court to a piece of paper in the form and semblance of a subpœna *duces tecum*. The Clerk handed it to the Marshal, and one of the Marshal's deputies, after handing it to the appellant, doubtless made a formal return to the Court in which he certified that it had been duly served. It was on the strength of the pretended legal validity of this piece of paper that the appellant was compelled to leave his business and attend before the Grand Jury; and it is because he refused to answer the questions the District Attorney put to him in the Grand Jury room, and declined to produce what the paper called for, that he was arraigned in court,

ordered by the Court to answer the questions and produce the papers, adjudged in contempt for a failure to comply with the order, and, finally, committed to the custody of the Marshal until he did so comply.

But, irrespective of the origin of the subpœna, and the jurisdiction of the Grand Jury to conduct such an investigation as that disclosed by the record, its further extraordinry nature must be taken into consideration. As the Circuit Judge said:

> "The petitioner was required to produce a numerous array of documents and papers for the purpose of ascertaining whether they contained anything which would tend to establish the commission of an offense by either of the two corporations; and it is apparent that the object was to enable the Government by inspecting this mass of the private papers and documents of the petitioner's corporation to find something which might induce the Grand Jury to find an indictment against his corporation (Record, p. 33). * * * It falls but little short of being, in substance and effect, a roving commission devised by the Government to compel a witness to bring before the Grand Jury a general mass of the private papers of his principal in order that the prosecuting officer might discover whether at any time during its corporate life the principal had been a party to any act which could afford the basis of a criminal accusation" (*Id.*, p. 34).

It thus appears:

(*a.*) That the subpœna was issued in the absence of any pending charge or issue in respect to which the relevancy or irrelevancy of the papers, &c., could be asserted, much less determined, and was, therefore, an unlawful invasion of the right of privacy of the appellant and his corporation, regardless of their criminating nature.

(*b.*) It was a roving commission designed to force the production for search of all the correspondence

and agreements of the corporation during its entire corporate life with a large number of individuals and other corporations, and was for this reason an equal invasion of the right of privacy regardless of the character of the papers called for

(c.) It was issued as a means of forcing the corporation, through the appellant, a temporary custodian of the same, to produce for search its private papers and documents in order to fix upon the corporation the commission of some crime, and thus, by indirection compel it to furnish evidence against itself in a criminal case. It contemplated, in fact, the very thing that Mr. Justice Bradley holds to be within the condemnation of Lord Camden's judgment, namely, the "forcible and compulsory extortion of (the corporation's) private papers to be used as evidence to convict (it) of crime."

Boyd v. *United States* (*supra*).

The learned Circuit Judge, referring to the dragnet nature of the subpœna, and the purpose for which it was issued, says:

> "It is this which gives to the proceeding its color of oppression, and the attributes of an unreasonable search and seizure. * * * This was a wanton assault upon the right of privacy, and in my judgment the process in view of the circumstances under which, and the purpose for which it was issued, authorized an unreasonable search and seizure of papers within the spirit and meaning of the Fourth Amendment" (Record, pp. 33-34).

We submit that either of the vices above pointed out was of itself sufficient to defeat the endeavor of the Government to enforce the production of the corporation's books and papers.

As we have shown, the case of *Entick* v. *Carrington* was decided upon the principle that any invasion of the right of privacy is a trespass, and can only be excused or justified by some positive law

expressly authorizing it. The fourth amendment was designed to permanently ingraft this principle in our system of government, and whether a subpœna *duces tecum* for papers or a search warrant for chattels be issued, the spirit of the amendment demands that while in the latter case there must be probable cause, supported by oath or affirmation, with a description of the place to be searched, &c., in the former it must be shown to the Court or authority issuing the process that there is some proper cause pending in relation to which the papers or documents called for are material evidence.

In re Lester, 77 Georgia, 143.
Appeal of Hartranft, 85 Pa. St., 433.
Ex parte Brown, 72 Missouri, 83.
In re Moser, 101 N. W. Rep., 588.

The process must, moreover, give a reasonably accurate description of the papers whose production is sought.

Ex parte Brown, supra.
In re Moser, supra.
Sandford v. Nichols, 13 Mass., 286.

In the *Moser* case (*supra*) the Court said:

> "Whether the production is by search warrant or by a *subpœna duces tecum*, the necessity therefor must be shown to the Court, and the particular documents or records required sufficiently specified in the application; and in either process courts will permit only the examination of such parts thereof as relate to *the issue* before the Court."

(*a.*) We have already shown that the subpœna in the case at bar was issued in the absence of any pending judicial cause or proceeding in respect to which the relevancy of anything called for by the subpœna could be determined or even asserted.

(*b.*) It is furthermore obvious that so far from describing the papers whose production was sought

with reasonable accuracy, it lacked any specification whatever in that regard.

The situation was, indeed, not unlike that in *ex parte Brown, supra* (72 Mo., 83), where the petitioner, the manager of the Western Union Telegraph Company at St. Louis, was committed for contempt by the St. Louis Criminal Court for refusing to obey a subpœna *duces tecum*, calling for the production of "any or all telegraphic dispatches or messages, or copies of the same," then in the company's office, described as "Dispatches between (various parties named) sent or received by or between any or all of said parties, within fifteen months last past."

The Supreme Court of Missouri, in discharging the petitioner, said:

> "To permit an indiscriminate search among all the paper's in one's possession for no particular paper, but some paper, which may throw some light or some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people. A grand jury has a general inquisitorial power. They may ask a witness summoned before them, without reference to any particular offense which is a subject of inquiry, what he knows touching the violation of any section of the criminal code.* Give such a body, in addition, the power to search any man's papers for evidence of some crime committed, and you convert it into a tribunal which would soon become as odious to American citizens as the Star Chamber was to Englishmen, or the Spanish Inquisition to the civilized world."

Here there was nothing before the Circuit Court showing the necessity for the subpœna. Its necessity could not have been shown since there

*The application for the subpœna stated that the telegrams were "needed as evidence and are material in certain matters now pending before the Grand Jury," &c. There was no question raised as to the *inquisitorial power of* the Grand Jury (72 Mo., p. 87).

was no cause pending. The papers called for were neither described, nor was there anything to indicate their relevancy to any matter of which the Court might have taken cognizance. In these circumstances it is plain that the issuance and service of the subpœna upon the appellant was an unwarranted and arbitrary interference with his personal liberty and assault upon his right of privacy, and that he was under no obligation to obey it.

(c.) The papers mentioned in the subpœna being the property of the MacAndrews & Forbes Company, and in the petitioner's temporary custody solely by reason of his official relations toward that corporation, the compulsion of the subpœna would have constituted an unreasonable search for and seizure of the papers and effects of the corporation; and would, moreover, have compelled it by indirection to furnish evidence against itself in a criminal case, in violation of its constitutional rights.

A corporation cannot be compelled to furnish incriminating evidence against itself and it is entitled to the same immunity in this regard which the common law and our Constitution accord to private individuals.

In *United States* v. *General Paper Co.*, now on appeal to this Court, the Circuit Judge of the District of Minnesota seems to have regarded the question as a mooted one, although he says:

> "I am inclined to the view that the constitutional provision, if broadly construed, as it should be, includes corporations."

Professor Wigmore in his recent work on Evidence (Sec. 2259, Vol. 3, p. 3116), however, thus broadly states the proposition:

> "It is also plain * * * that a *corporation* when discovery is sought from it as such, is to be equally protected from disclosure, so

far as it is capable of committing a criminal act."

Citing

King of Sicilies v. *Wilcox*, 7 St. Tr. (N. S.), 1049, 1062.

Logan v. *Penn. R. Co.*, 132 Pa. St., 403, 408.

In the former case the English Court of Chancery held (per Shadwell, *V. C.*), that a corporation was not privileged from making disclosures under a bill in chancery alleging a violation of the Foreign Enlistment Act, but the Vice-Chancellor based his ruling upon the express ground that the corporation was not indictable under the act.

In *Logan* v. *Penn. R. Co.* (*supra*), the Court below refused to grant an order for the production on the trial of books and papers in the defendant's possession in so far as it was sought by them to establish a liability of the defendant to the plaintiff for a penalty imposed by an Act of Assembly, saying (p. 408):

> "We have carefully considered the position taken by the plaintiff's counsel at the reargument that we may require the defendant corporation to produce the required writings, even though a natural person in a like case could not be called upon for their production. We are not able to agree with the reasoning. We think the rules of evidence and the rules of law for the production of writings are essentially the same, whether the defendant is a natural oran artificial person."

The appeal was quashed, the order being merely interlocutory.

See also *Davies* v. *Lincoln National Bank*, 4 New York Supplement, 373, where, in an action to subject a corporation to a penalty, an order for the examination of its president, requiring him to produce its books, was vacated on the ground that the corporation could not thus be forced to produce evidence for the purpose of subjecting it to a penalty.

Perhaps other citations could be made from authors of text books or treatises on the Constitution, but a fairly diligent search does not show other adjudications sustaining, and none denying, the proposition that corporations are entitled to the protection of the Fourth and Fifth Amendments. The proposition seems to us certainly sound in principle. So far as the right of privacy is concerned—the right to have one's private papers secure from unreasonable search, without reference to their incriminating nature—we can see no reason why the fact that individuals see fit to carry on certain of their business under lawful corporate form, should deprive that corporation -and therefore them - of the right of privacy with respect to that business. So far as the right to be protected against the search of its papers for the purpose of incrimination is concerned,—it seems to us manifest that where there exists criminal liability there must exist also constitutional guarantee against the compulsory production of self-incriminating evidence. There does exist a criminal liability against the corporation whose papers are thus sought to be compulsorily produced for examination by the express terms of the Sherman Anti-Trust Law.

There are other considerations that induce the same conclusion. This Court has repeatedly held that a corporation is a "person" and protected by the Fourteenth Amendment, which provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." (*Santa Clara County* v. *R. R.*, 118 U. S., 394; *Mining Co.* v. *Pennsylvania*, 128 U. S., 181.) One finds it difficult to conceive how one can be a "person" under the Fourteenth Amendment and not one of the "people" under the Fourth Amendment. While the question here presented—to wit, the rights of corporations under the Fourth Amendment—has never before been presented to this Court, we find the conclusion inevitable that the same reasons

that induced the Court to hold, when the question was an open one, that corporations are included in the word "person," and are protected against the unlawful acts of States, will also induce the holding that they are included in the word "people," and are protected against the unlawful acts or attempts of the Federal Government. The Fourth Amendment and the Fourteenth protect rights of the same kind—rights that the world has come to believe are the most prized possession of Anglo Saxons. They both protect rights of the kind referred to by Mr. Justice Harlan when he said (*Dis. of Hawaii* v. *Mankichi*, 190 U. S., 197, 236):

> "In my judgment neither the life, nor the liberty, nor the property of *any* person, within any territory or country over which the United States is sovereign, can be taken under the sanction of any civil tribunal, acting under its authority, by any form of procedure inconsistent with the Constitution of the United States."

Of course, a corporation can only be examined through its officers, directors or agents. In the present case the Government undertook deliberately by that method to compel the corporation to submit to examination, not as a witness to be sure, but through the subterfuge of forcing one of its officers and directors to produce its books and papers before the Grand Jury under the coercion of a subpœna; and this for the sole purpose of ascertaining by the examination and inspection of these books and papers, whether or not the corporation had committed a crime for which it was indictable under the Sherman Act.

The rule relied upon by the Government that the protection of the Fourth and Fifth Amendments is the personal privilege of the witness and cannot be claimed for the benefit of another has no possible application to the case of an officer, director or agent

of a corporation who seeks to secure to the corporation its constitutional rights and immunities; for these rights can only be asserted through its officers, directors and agents.

In this view the witness is not seeking to invoke the privilege of another, but the corporation itself invokes its own privilege in the only manner and by the only means it can employ for that purpose. The appellant, when called before the Grand Jury, was there in no individual or personal capacity, but was to all intents and purposes, the corporation itself which, through him, merely asserted its legal rights. If it cannot so assert them, it can never assert them at all.

If, under these circumstances it could be said that the corporation was a witness, and, therefore, entitled to the immunity afforded by the statute, this might, perhaps, meet our present contention. But the position of the Government is that the corporation is not protected by the statute. Its avowed purpose is to use the papers as the basis of an indictment against the corporation; and its argument in support of its right so to do is that the corporation is not a witness, and therefore cannot plead privilege, that its officer, who is a witness, can plead only his personal privilege, and not the privilege of the corporation, which is a separate entity, and that as the corporation has no privilege it has no immunity. The Government further argues that by whatever means the corporation's papers are brought into Court, whether rightful or wrongful, when they are once there they may be used in evidence, and that the corporation cannot object to their use even though they are intended to be made the basis of an indictment against the corporation.

The Government in the Circuit Court cited, in support of their contention that the constitutional privilege against self-incrimination in the case of an agent of a corporation called as a witness was per-

sonal to the witness as distinguished from that of the corporation, the following cases:

New York Life v. *People*, 195 Ill., 430.
U. S. Express Co. v. *Henderson*, 69 Iowa, 40.
In re Peasley, 44 Fed. Rep., 271.
In re Moser, 101 N. W. Rep., 588.

These cases fairly sustain this general proposition that the privilege under the Fifth Amendment is personal to the witness. He also invokes the last three authorities cited for the proposition that the agent of a corporation cannot refuse to produce its books and papers on the ground that their production would criminate the corporation and that a subpœna calling for their production is therefore void under the Fourth Amendment.

An examination of these cases shows that they sustain no such proposition.

In the *Henderson* case the witness did not refuse to answer on the ground that the subpœna to produce the papers of the corporation was in violation of the Fourth Amendment, but merely that he was privileged from producing them under a provision of the Iowa code excusing a witness from answering when the matter sought to be elicited will render *him* criminally liable. It was argued that the witness and the corporation were identical. The Court held, however, that the fact the witness' employers had taken on a corporate character did not identify them with the witness so as to give the corporation the privilege pleaded. The right of the prosecuting power to extort incriminating evidence from a corporation by means of a subpœna *duces tecum* addressed to one of its employees, in violation of the Fourth Amendment, was not presented or considered.

If it is true as held in the *Henderson* case that the corporation cannot plead the Fifth Amendment on the ground that through its officers it has become a witness, then it is clear that

the Act of February 25, 1903, gives it no immunity, for that act is directed to the protection of witnesses, and not to the protection of mere owners of criminating documents.

Indeed, in *re Pooling Freights*, 115 Fed. Rep., 588, Hammond, *J.*, in charging a grand jury, said that although corporations were indictable under the Interstate Commerce Law, the immunity clause of the Act of 1903

> "does not grant immunity from indictment and prosecution to a corporation even though its officers or agents have been compelled to appear before the Grand Jury and testify to facts which would tend to criminate it, or produce books and papers of the corporation bearing upon the offense of which it is charged."

In the *Peasley* case both the Fourth and Fifth Amendments were pleaded, but Gresham, *J.*, held that the Fourth Amendment did not apply because *corporations acting as common carriers between States are not liable criminally for violations of the Interstate Commerce Act, nor are they exposed to its penalties and forfeitures.*

In the *Moser* case the privilege pleaded was that the incriminating papers had been subpœnaed for the avowed purpose of obtaining evidence against other officers of the corporation—not against the corporation. It was held that the books belonged, not to the officers, but to the corporation, and were in its possession, and that the witness could not object any more than the corporation could to the production of the corporate books for the purpose of incriminating, not the corporation, but its officers. The Court said, per Grant, *J.* (p. 592):

> "No private individual can be compelled to produce his books or papers for the purpose of affording evidence against himself in a criminal prosecution. Neither can *the subterfuge of subpœnaing his clerk*, who has access to, or temporary possession of, the books for

> the purpose of his employer's business, be resorted to to compel a production of the books. The possession of the clerk in such case is the possession of his employer. The books of a corporation are not the private property or books of petitioner or any other officer of the company. The corporation is a distinct entity. * * * We think the rule is this: One can not be compelled to produce his own books, or the books of another which are under his control as agent or otherwise, where their production would tend to criminate him; *neither can his clerk, whose possession is his possession, be required to produce them;* but when, as the agent of another, he chooses to make entries on the books of that other, and those books are in the actual and legal possession and control of another officer of the corporation, or of the corporation itself, such officer may be compelled to produce them *in a proper case* under a subpœna *duces tecum*."

It is not a "proper case," as pointed out in this opinion, where an employee of a corporation whose possession is its possession, is called upon to produce papers for the purpose of furnishing a basis for the indictment of the corporation.

This is simply an application of the rule laid down in the *Boyd* case, the authority of which has never been impaired.

In *Interstate Commerce Commission* v. *Brimson* (154 U. S., 447, 479), the Supreme Court said:

> "We said in Boyd *v.* U. S., and it cannot be too often repeated, that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacy of his life."

In *Adams* v. *New York* (192 U. S., 585, 597) the Court said, with reference to it:

> "The case has been frequently cited by this Court, and we have no wish to detract from its authority."

We theremore submit with great confidence that the cases cited by the government, as well as the *Boyd* case, establish the proposition that the subpœna in this case was an instrument devised for the accomplishment of an unreasonable search and seizure within the spirit and meaning of the Fourth Amendment, unless contrary to the contention of the Government, and contrary to the holding in the *Anderson* and *Pooling Freights cases* (*supra*), a corporation against whose officers such a subpœna is enforced becomes thereby a witness, and is therefore entitled to the immunity afforded by the act of 1903. We do not understand that this point was at all involved in the *Baird* case (194 U. S. 250). It considered the Fourth Amendment only in regard to the witness, and not with respect to the corporation whose officer he was.

If the corporation is entitled to immunity, the Government is engaged in an utterly idle proceeding, namely, in an endeavor to secure an indictment of a corporation upon evidence, the production of which bars the indictment.

Are our Constitutional safeguards against self-incrimination more infirm than those furnished by the common law? In former times it was thought a startling proposition that a corporation could be called upon to furnish evidence against one of its members. Here a corporation is sought to be compelled by indirection to furnish evidence against itself.

In *Rex* v. *Purnell*, Wilson, 239, the Attorney-General, who had exhibited an information against the defendant for a misdemeanor and misbehavior in the neglect of his duty, both as Vice-Chancellor and Justice of the Peace of the University of Oxford, moved for liberty to inspect the statutes of the University, which were kept by a proper officer called *Custos Archivorum*, whereby it would appear what was the duty of the Vice-Chancellor.

Counsel for the defendant objected that what was asked was

> "contrary to the well known maxim of law, that no man is obliged to accuse himself, and more especially in a criminal prosecution, as this is. Doctor Purnell, a single member of the University, is prosecuted in a criminal matter; the like rule might as well be prayed in the case of an indictment of any other member or scholar; or if any one citizen of London was prosecuted, the like rule might as well be prayed to inspect the books, papers and archives of the city, which no young gentleman who attends this bar will be so weak as to move."

And further:

> "Supposing the defendant has these statutes in his custody, he is only a trustee for the corporation, and whatever crime he may have been guilty of, that cannot affect the University; * * * and if this Court was to make this rule absolute, it will (instead of doing justice) lay a foundation for something like an *inquisition of state*, for this Court sits to *hear* evidence, not to *furnish* it."

Counsel for the Crown insisted that the *public justice* of the nation was concerned, that the Crown gave the statutes whereby the Vice-Chancellor was to govern himself and be governed, that the King had a right to see them, that it might be known and seen *whether* he had so done.

Chief Justice LEE, delivering the opinion of the Court, said:

> "We are all of opinion that we cannot make this rule absolute, and found that opinion upon former cases, but think *this* is a much stronger case than any of them. The only case cited for the King upon the motion for this rule was *Rex* v. *Berkett* or *Berking*, which was an indictment for exercising a trade, not having served an apprenticeship; application was made that the prosecutor might be named; the court could not do *that*, but said 'You may have a rule to take a copy of the record,

and then you will see upon the back side of the indictment who the prosecutor is;' they had certainly a right to a copy of the record below, and if refused, this Court would have granted a rule, but this is not to the present purpose. The case to the present point is 2 Ld. Raym., 927. The *Queen* v. *Mead*, 2 Anne, where the reason given for refusing the rule was the maxim mentioned at the bar, '*That no man is bound to accuse himself.*' Another strong case was in this Court. Trin. 17 & 18, Geo., 2, *Rex* v. *Cornelius* of Ipswich. An information was filed against him and another justice of peace for exacting money from persons for licensing alehouses; it was moved by the prosecutor for leave to inspect the corporation books; a rule was made to show cause in the usual terms to inspect the papers, books and records of the corporation; and upon showing cause it was very strongly debated on both sides by Sir John Strange and Sir Richard Lloyd, and all the cases cited then that have been now cited, before the rest of my brethren (myself absent), time was taken to consider, and I had a conference with my brothers, and we all agreed the rule could not be granted, because it was a criminal proceeding, and that the motion was to make the defendants furnish evidence against themselves; the present case is rather stronger, because it is a prosecution for a *crime of a more public nature*, for unless it be *such*, this Court has no jurisdiction. And this is unlike a *quo warranto*, for that is a right granted by the Crown, and the public books and records are the proper evidence on both sides. Rule discharged."

CONCLUSION.

The order dismissing the writ should be reversed, and the petitioner discharged.

DE LANCEY NICOLL,
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[S3156]